FILE COPY

PETITION NOT PRINTED

Office Supreme Court, U.S.
FILED
JAN 16 1961
JAMES R. BROWNING, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 181

EMIL RECK,

Petitioner,

vs.

JOSEPH E. RAGEN, Warden,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

ANTHONY BRADLEY EBEN
1 North LaSalle Street
Chicago, Illinois

DONALD PAGE MOORE
105 West Adams Street
Chicago 3, Illinois

RICHARD A. SIEGAL
135 South LaSalle Street
Chicago, Illinois

Attorneys for Petitioner

INDEX

SUBJECT INDEX

	Page
BRIEF FOR PETITIONER:	
Citations to Opinions Below	1
Jurisdiction	2
Constitutional Provisions and Statutes Involved	2
Questions Presented	2
Statement	3
A. The Record	3
B. The Procedural History	4
C. The Crime, Confession and Conviction	6
D. The Mentality and Personality of Emil Reck	6
E. The Detention and Interrogation of Emil Reck	9
The First Day	10
The Second Day	11
The Third Day	13
The Fourth Day	23
The Fifth Day	37
The Sixth, Seventh and Eighth Days	40
The Ninth Day	40
Postscript	40
Controverted evidence of physical brutality inflicted by police officers upon Emil Reck	41
Summary of Argument	43
Argument	45
I. Emil Reck's Confessions Were the Product of Psychological Coercion	45
(1) The power of resistance of the person confessing	46
(2) The circumstances of pressure	46

Page

II. Emil Reck's Confessions Were the Product of Physical Coercion 49

III. The Majority Opinion of the Court of Appeals Below Misapprehends the Undisputed Facts in the Record, and Misconceives the Meaning of This Court's Prior Decisions Dealing With Coerced Confessions 52

IV. The District Court's Theory That the Coerced Confession Decisions of This Court Were Limited to "Prospective" Application Is Not Justified by the Rationale or History of the Constitutional Law of Coerced Confessions 56

(1) Coerced confessions—occurring before or after 1936 or involving physical or mental coercion—have always been condemned by the Constitution of the United States 57

(2) The District Court relied upon factual assumption which find no support in the record and which are irrelevant to the issues in this case 62

Conclusion 66

Citations

CASES:

Blackburn v. *Alabama*, 361 U.S. 199 (1960) 45, 46
Bram v. *United States*, 168 U.S. 532 (1897) 59, 60, 61
Brown v. *Mississippi*, 297 U.S. 278 (1936) 49, 51, 60
Chambers v. *Florida*, 309 U.S. 227 (1940) 60, 65
Fikes v. *Alabama*, 352 U.S. 191 (1957) 45, 46, 47, 55, 61, 63
Gallegos v. *Nebraska*, 342 U.S. 55 (1951) 52, 53
Haley v. *Ohio*, 332 U.S. 596 (1948) 45, 46, 48, 55
Lisenba v. *California*, 314 U.S. 219 (1941) 52, 53
Malinski v. *New York*, 324 U.S. 401 (1945) 45
Napue v. *Illinois*, 360 U.S. 264 (1959) 51, 64

Page

Payne v. *Arkansas*, 356 U.S. 560 (1958) 45, 63
People v. *Vinci*, 295 Ill. 419 (1920) 58-59
Reck v. *Illinois*, 351 U.S. 942 (1956) 2, 5
Reck v. *People*, 7 Ill. 2d 261 (1955) 1, 9
Spano v. *New York*, 360 U.S. 315 (1959) 45, 46, 47, 48, 55, 61
Stein v. *New York*, 346 U.S. 156 (1953) 52, 53
Turner v. *Pennsylvania*, 338 U.S. 62 (1949) 45, 46, 47, 55, 63
Watts v. *Indiana*, 338 U.S. 49 (1949) 45, 46, 47, 54, 55
Ziang Sung Wan v. *United States*, 266 U.S. 1 (1924) 59, 60

CONSTITUTION AND STATUTES:

United States Constitution, Amendment XIV 2, 43, 45, 51, 62
28 U.S.C. §1254 2
28 U.S.C. §2241 2

MISCELLANEOUS:

IV Reports, National Commission on Law Observance and Enforcement (1931) 58

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 181

EMIL RECK,

Petitioner,

vs.

JOSEPH E. RAGEN, Warden,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

Citations to Opinions Below and to Related Opinions

The majority and dissenting opinions of the Court of Appeals are set forth in Appendix A to the Petition for Certiorari and are reported at 274 F.2d 250 (7th Cir. 1960). The judgment of the Court of Appeals is set forth in Appendix B to the Petition for Certiorari. The opinion of the District Court is set forth in Appendix C to the Petition for Certiorari and is reported at 172 F. Supp. 734 (N.D. Ill. 1959). A prior opinion of the Supreme Court of Illinois, affirming the denial of relief to petitioner under the Illinois Post Conviction Hearing Act, is reported in *Reck* v. *People*, 7 Ill.2d 261 (1955). The prior order of the Supreme Court of the United States denying a peti-

tion for writ of certiorari to the Supreme Court of Illinois is reported in *Reck* v. *Illinois*, 351 U.S. 942 (1956).

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1). The judgment of the Court of Appeals was entered on January 13, 1961. The petition for a writ of certiorari was filed on April 3, 1960, and was granted, with leave to proceed *in forma pauperis*, on June 27, 1960. 363 U.S. (Adv.) 838.

Constitutional Provisions and Statutes Involved

U. S. Constitution, Amendment XIV, Section 1:

"... nor shall any State deprive any person of life, liberty or property, without due process of law ..."

28 U.S.C. §2241:

"(a) Writs of habeas corpus may be granted by ... the district courts ...

* * * * * *

"(c) The writ of habeas corpus shall not extend to a prisoner unless—

* * * * *

"(3) He is in custody in violation of the Constitution or laws or treaties of the United States ..."

Questions Presented

1. Is it not a denial of due process to permit the prosecution, in a murder trial, to introduce in evidence the confessions of a mentally retarded teen-aged defendant

obtained from him during an eight-day *incommunicado* detention, in the course of which he received virtually no food and repeatedly fainted, vomited blood, was hospitalized, and was denied access to family and counsel?

2. Was it not a denial of due process in 1936 to permit the introduction into evidence of confessions obtained under the above circumstances?

3. Is it not a denial of due process to permit the prosecution, in a murder trial, to introduce in evidence the confessions of a defendant whose corroborated testimony of police brutality, although denied by the police, is the only plausible explanation for his physical collapse, vomiting of blood and emergency hospitalization while in police custody?

Statement

A. The Record:

On November 23, 1960 the Clerk instructed Counsel to proceed upon the original papers comprising the transcript of record in this Court. Citations to the record in this brief therefore refer to the page numbers of the original transcripts rather than to the usual printed record.[1]

---

[1] Citations herein to the transcript of proceedings in the District Court below (which is separately bound with blue paper covers and whose pages are separately numbered) will be made in the customary form, e.g., "R. 25."

Citations to testimony contained in the State Court transcripts received in evidence as Exhibits 1 and 2 by the District Court will be made by designating the appropriate exhibit, the page number therein, the name of the witness, and the party who called him to the stand: e.g., "Ex. 2, p. 912 (Officer Reilly, State's Witness); Ex. 1, p. 716 (Dr. Weissman Defense Witness)."

In the record, Exhibit 1 is composed of five transcripts bound in blue or brown paper covers, with their pages consecutively

B. The Procedural History:

Petitioner Emil Reck seeks reversal of a decision of the Court of Appeals for the Seventh Circuit (Duffy, *J.*, dissenting), which affirmed an order of the District Court for the Northern District of Illinois quashing a writ of habeas corpus.

Respondent Joseph E. Ragen is the Warden of the Illinois State Penitentiary at Joliet, Illinois, and has custody of Petitioner Reck.[1a] Emil Reck was convicted of murder in the courts of Illinois in 1936. He was sentenced to 199 years in prison and is serving that sentence now.[2]

Reck claims that two written confessions, obtained from him by police officers and received in evidence against him, were coerced and that his imprisonment therefore is in violation of the due process clause of the Fourteenth Amendment. In a post-conviction hearing, in an appeal to the Illinois Supreme Court, and in a timely prior peti-

---

numbered throughout. These page numbers appear in red figures in the lower left corner of each page.

Exhibit 2 is composed of two volumes bound with black boards, with their pages numbered consecutively throughout. These page numbers are typed at the bottom of each page.

Exhibit 1 includes (1) the common law record of Reck's trial in the Criminal Court of Cook County (pp. 11-47), (2) the record of Reck's post-conviction hearing (pp. 235-497), (3) the proceedings at Reck's trial from the time the jury was impanelled until the judge, after a hearing outside the presence of the jury, denied the motion to suppress the confessions (pp. 498-980), (4) the text of the confessions (pp. 981-1075), and (5) the pre-trial sanity proceedings (pp. 1081-1114).

Exhibit 2 comprises all of the trial proceedings subsequent to the judge's denial of the motion to suppress the confessions.

[1a] R. 5 (Petition for Habeas Corpus).

[2] Ex. 2, pp. 1099-1100 (Announcement of Judgment by Judge Burke); R. 4-5 (Petition for Habeas Corpus).

tion for certiorari to this Court, Reck has asserted this claim.[3]

In its prior denial of certiorari, this Court stated that its order was "without prejudice to an application for a writ of habeas corpus in an appropriate United States District Court." *Reck* v. *Illinois*, 351 U.S. 942 (1956).

Accordingly, Reck filed his petition for habeas corpus.[4] The writ issued, and at the hearing the District Court received into evidence the transcripts of all proceedings in the Illinois courts, including more than 1,000 pages of transcript which were not before this Court on the prior application for certiorari.[5] Subsequently, the District Court denied the requested relief, holding that *although by current standards Reck had been denied due process of law,* a new trial must be denied him because the Fourteenth Amendment did not, as of the time of Reck's conviction, forbid the use of coerced confessions unless there was a clear showing of physical brutality.[6] The Court of Appeals ignored the District Court's theory but affirmed its result, holding that Reck's confessions were not the result of coercion, psychological or otherwise. Judge Duffy dissented, terming portions of the majority opinion "amazing"[7] and citing five recent decisions of this Court which the majority had ignored.[8]

---

[3] See the papers in *Reck* v. *Illinois*, 351 U.S. 942 (1956), No. 579 Misc., Oct. Term, 1955.

[4] R. 4-12 (Text of Petition for Habeas Corpus).

[5] R. 65-66 (Stipulation). These additional pages of transcript comprise Exhibit 2 of the record.

[6] R. 43, 52, 54; Petition for Certiorari, Appendix C, pp. 27, 32-33, 34; 172 F. Supp. at 742, 745.

[7] Petition for Certiorari, Appendix A, p. 7; 274 F.2d at 254.

[8] Petition for Certiorari, Appendix A, p. 9; 274 F.2d at 255.

C. The Crime, Confession and Conviction:

On January 3, 1936, Dr. Silber C. Peacock, a Chicago physician, was found murdered on the floor of his automobile. He was dead from a bullet wound and 13 deep lacerations in his head.[9] Three months later, on Wednesday, March 25, 1936, the Chicago police arrested four teenaged boys for bicycle theft. One of these boys was Emil Reck. On Saturday, March 28, after 80 hours of incommunicado detention and interrogation, culminating in violent illness and hospitalization, Emil Reck participated with the other three boys in a joint confession to the Peacock murder. Their individual confessions were taken on the following day.[10]

Two of the boys, Durland Nash and Robert Goethe, pleaded guilty.[11] Emil Reck and the fourth boy, Michael Livingston, pleaded not guilty, claiming their confessions were extracted from them by police torture. Both boys were jointly tried for murder; their confessions were received in evidence over their objections,[12] and they were convicted.[13]

D. The Mentality and Personality of Emil Reck:

The following summary of the facts concerning the mentality and personality of Emil Reck is based solely upon uncontroverted facts in the record.

The District Court below found as a fact that "Reck was a mentally retarded boy with a general weak character

---

[9] R. 22; Petition for Certiorari, Appendix C, p. 12; 172 F. Supp. at 735.

[10] R. 22, 29-30, 41-43; Petition for Certiorari, Appendix C, pp. 13, 17-18, 25-26; 172 F. Supp. at 735, 737-38, 741-42.

[11] Ex. 1, pp. 882, 901 (Stipulations).

[12] Ex. 1, pp. 551, 981.

[13] Ex. 2, pp. 1099-1100.

and no previous criminal record which might greatly affect his 'power of resistance.'" [14]

Emil Reck did not walk or talk until he was two and a half years old.[15] When he was eight, he was diagnosed as a "border-line mental defective." When he was twelve, he was classified as a "high-grade mental defective" and was placed in an institution for mental defectives[16] on a "feeble-minded petition." [17] At this time, the examining psychiatrist reported that Reck maintained a staring expression throughout their interview, the only change being a twisting of his mouth at one side; that answers had to be squeezed out of him; that he remained silent for a long time and questions had to be repeated in order to make him answer, which was often done by merely shaking his head or shrugging his shoulders. Reck was described as inert, sensitive ("tears come to his eyes when discussing his backwardness in school"), and lacking in initiative.[18]

In 1933, Reck dropped out of school when he was 16 years old. He was in the seventh grade.[19] His work record during the next three years was that of an unskilled adolescent during the worst of the depression. He spent almost a year in the C.C.C. and the P.W.A. He worked for a milkman one week. He had no other jobs.[20]

---

[14] R. 41; Petition for Certiorari, Appendix C, p. 25; 172 F. Supp. at 741.

[15] Ex. 1, p. 25.

[16] Ex. 1, pp. 19, 31.

[17] Ex. 1, p. 26.

[18] Ex. 1, p. 28.

[19] Ex. 1, p. 15.

[20] Ex. 1, pp. 15, 16.

Aside from his retardation, Reck was never a behavior problem either in school or at home.[21] He never remained away from home overnight and seldom stayed out late.[22] He was very quiet[23] and neat.[24] He did not get into fights.[25] He had no peculiarities of conduct, mood, speech or appearance,[26] but was withdrawn, apathetic, reticent, and gave the "impression of general retardation."[27] He was considered a "weakling"[28] who would "cry pretty easily."[29] He had never been arrested and had no record of delinquency.[30]

At the time of his arrest, confession and conviction, Emil Reck was 19 years old.[31] Shortly before his trial, Reck was examined at the Behavior Clinic of the Criminal Court of Cook County. In that examination he was unable to state the result of dividing 25 by 5 and did not know how many weeks there are in a year, how many feet in a yard, how many quarts in a gallon, when Columbus discovered America, who fought in the Civil War, or the names of the capitals of Illinois, England, France, or Germany.[32]

---

[21] Ex. 1, p. 19.

[22] Ex. 1, p. 29.

[23] Ex. 1, p. 28.

[24] Ex. 1, p. 29.

[25] Ex. 1, p. 27.

[26] Ex. 1, p. 14.

[27] Ex. 1, pp. 19, 28.

[28] Ex. 1, p. 27.

[29] Ex. 1, p. 882 (Goethe, Defense Witness).

[30] Ex. 1, p. 32.

[31] Ex. 2, p. 1093.

[32] Ex. 1, p. 17. Reck did, however, know some of the answers to simple problems in arithmetic, and some of the significant names

Dr. Harry R. Hoffman, director of the Behavior Clinic, found Reck of "dull normal intelligence," but without nervous or mental disorder, and he concluded that Reck was not committable as insane or feebleminded.[33]

Dr. Hoffman was the only expert witness called by either side at the trial to testify as to the mentality and personality of Emil Reck. He was a psychiatrist with many years experience. The State admitted his qualifications.[34] *He testified that Reck had the intelligence of a child between 10 and 11 years of age.*[35]

E. The Detention and Interrogation of Emil Reck by Police and Prosecutors:

The Illinois Supreme Court found that Reck "was in the custody of the police for a week, during which time he was frequently ill, fainted several times, vomited blood on the floor of the police station and was twice taken to the hospital on a stretcher. During that week no formal charge was placed against [Reck], and he was confined practically *incommunicado.*" *Reck* v. *People,* 7 Ill.2d 261, 264 (1955).

The following account of the manner in which the State procured Reck's confessions is based upon uncontroverted evidence except in those instances where conflicts in the testimony are specifically noted. Most of this account is based upon the evidence of the police officers, prosecutors, court reporters, and physicians who were called as witnesses by the State and for whose credibility the State necessarily vouched.

---

in the history and geography of America. For example, Reck knew that the Mississippi was a big river, that New York was a big city, that Washington was our capital, and that President Hoover preceded President Roosevelt. *Ibid.*

[33] Ex. 1, p. 18.

[34] Ex. 2, pp. 352-54 (Dr. Hoffman, Defense Witness).

[35] Ex. 2, p. 363 (Dr. Hoffman, Defense Witness).

The First Day:

Reck was arrested at 11:00 A.M., Wednesday, March 25, 1936.[36] He was then at the home of Robert Goethe, where he had gone to eat,[37] Goethe, who like Reck was 19 years old,[38] was arrested also, and the boys were taken to a squad car where they found Durland "Jimmie" Nash, a third teen-aged prisoner of the police.[39] No resistance to the arrest was made.[40]

By 11:05 A.M. the three prisoners were in the 30th District (North Avenue) Police Station.[41] After ten minutes alone with Officer Susenbeck and a male secretary on the second floor of the Station, Reck was taken to the Shakespeare Avenue Police Station.[42] After two hours alone in a cell there,[43] Reck was returned by police wagon[44] to North Avenue, arriving at 1:15 P.M.[45]

---

[36] Ex. 1, p. 908 (Officer Reilly, State's Witness); Ex. 1, pp. 927, 930; Ex. 2, p. 977 (Officer Susenbeck, State's Witness). The hour of the arrest is fairly inferable from Officer Susenbeck's testimony that Reck was in the North Avenue Police Station by "11:05 or 11:06 A.M." Ex. 2, p. 977.

[37] Ex. 2, p. 452 (Reck).

[38] Ex. 1, p. 1033 (People's Exhibit 9).

[39] Ex. 1, p. 373 (Reck). Nash was 19 years old, see Ex. 1, pp. 1032-33 (People's Exhibit 9). Livingston was arrested later the same day. Ex. 1, p. 752 (Livingston, Defense Witness). Livingston was 17 years old. Ex. 2, p. 1094 (Verdict).

[40] Ex. 1, pp. 603-06 (Reck). Arresting officers Ryan and Norton (Ex. 1, p. 938, Capt. O'Connell, State's Witness) were never called to testify as to the circumstances of the arrest despite Reck's testimony that one of the officers said to him at that time, "Let's see you run." Ex. 1, p. 605 (Reck).

[41] Ex. 1, pp. 927, 930; Ex. 2, p. 977 (Officer Susenbeck, State's Witness); Ex. 1, p. 908 (Officer Reilly, State's Witness).

[42] Ex. 2, pp. 977-78 (Officer Susenbeck, State's Witness).

[43] Ex. 1, pp. 614-15 (Reck).

[44] Ex. 2, p. 915 (Officer Reilly, State's Witness).

[45] Ex. 2, p. 978 (Officer Susenbeck, State's Witness).

At the North Avenue Station, Reck was taken to a large room on the police station's second floor and there interrogated until 6:30 or 7:00 P.M.[46] The questioning centered around the alleged theft of a saxophone[47] and some bicycles.[48] Officers Reilly and Susenbeck participated in the interrogation.[49]

At the conclusion of this 5½ hour session, Reck was taken in a police wagon to the Warren Avenue Police Station.[50] He was kept there in a cell all night.[51]

During his detention on Wednesday, Reck was given a ham sandwich and coffee at the North Avenue Station. He was not fed anything at all at the Shakespeare Station.[52]

The Second Day:

Reck's interrogation resumed when he was delivered by wagon men to the North Avenue Station at about 10:00 A.M. on Thursday.[53] At this point Reck had been in custody for some 23 hours.

---

[46] Ex. 2, p. 978 (Officer Susenbeck, State's Witness); Accord: Ex. 2, p. 646 (Michael Livingston, Defense Witness); Accord: Ex. 2, p. 385 (Reck).

[47] Ex. 1, p. 909 (Officer Reilly, State's Witness); Accord: Ex. 2, p. 647 (Michael Livingston, Defense Witness); Accord: Ex. 1, pp. 640-41 (Reck).

[48] Ex. 1, pp. 649-50 (Reck).

[49] Ex. 1, pp. 294, 908-09; Ex. 2, pp. 915-16 (Officer Reilly, State's Witness); Ex. 2, pp. 978-80 (Officer Susenbeck, State's Witness).

[50] Ex. 1, pp. 653, 672; Ex. 2, p. 388 (Reck).

[51] Ex. 1, pp. 654, 672; Ex. 2, p. 389 (Reck).

[52] Ex. 1, pp. 654-55 (Reck). A typographical error in the District Court's opinion (R. 25-26; Pet. Cert. Appendix C, p. 15; 172 F. Supp. at 736-37) gives Reck three sandwiches or one more sandwich than he actually received.

[53] Ex. 2, p. 966 (Officer Kula, State's Witness).

Beginning at ten o'clock on Thursday morning, Reck was interrogated for some "six or seven hours" at North Avenue.[54] Approximately five officers participated in the questioning.[55] Among those present were Captain O'Connell,[56] Officer Susenbeck,[57] Officer Kula,[58] and, conspicuously, Officer Reilly, who claimed the "privilege" [59] of questioning Reck "all day".[60]

"A lot of questions" were asked.[61] Reilly was questioning his prisoner "about various crimes." He had a list "of every crime that was committed in the District." This list, said Reilly, "is what I am referring to as they would answer those questions." [62] But, Reilly testified, "there was not any purpose in [the] questioning." [63]

Eventually Reck was fed. He was given an egg sandwich and a bottle of milk but apparently nothing else.[64] There is no further testimony in the record as to food given Reck on Thursday.

---

[54] Ex. 2, p. 966 (Officer Kula, State's Witness).

[55] Ex. 1, p. 893 (Nash, Defense Witness).

[56] Ex. 2, p. 1021 (Capt. O'Connell, State's Witness). Ex. 1, p. 893 (Nash, Defense Witness).

[57] Ex. 2, p. 976 (Officer Susenbeck, State's Witness); Ex. 2, p. 944 (Officer Reilly, State's Witness); Ex. 1, pp. 656-67, *passim.*: Ex. 2, pp. 389, 392, 394 (Reck).

[58] Ex. 2, p. 944 (Officer Reilly, State's Witness); Ex. 1, p. 893 (Nash, Defense Witness).

[59] Ex. 1, p. 295 (Officer Reilly, State's Witness).

[60] Ex. 1, pp. 296-97 (Officer Reilly, State's Witness).

[61] Ex. 2, p. 944 (Officer Reilly, State's Witness).

[62] Ex. 2, p. 944 (Officer Reilly, State's Witness).

[63] Ex. 1, p. 912 (Officer Reilly, State's Witness).

[64] Ex. 2, p. 973 (Officer Kula, State's Witness).

After the North Avenue police were finished with Reck for the day, he was sent to the Shakespeare Station. Later that night he was taken downtown to the Detective Bureau, where he was placed on exhibition at a so-called "show-up" in which the victims of various crimes are brought in "to view suspects to see if they can make an identification."[65] He was not returned that night.[66] The record is silent as to where, and under what conditions, Reck spent the night. Reck himself testified that he was too sick to remember anything that happened on Thursday night.[67] The State volunteered no information on this score and did not call the police officers who had Reck in their charge during this period.

On Thursday, Reck's father attempted to locate his son. He went to the North Avenue Station but could get no information concerning Reck's whereabouts.[68]

The Third Day:

Reck's father came to the North Avenue Station again on Friday but was not allowed to see his son.[69] The State again failed to disclose where, and under what conditions, Reck spent Friday morning. The record is silent as to the precise time when the police interrogation of Emil Reck resumed on Friday. Reck testified that questioning had been in progress for "five or six hours" prior to his first trip to the County Hospital on Friday evening.[70] This

---

[65] Ex. 2, pp. 1030-31 (Capt. O'Connell, State's Witness).

[66] Ex. 2, pp. 1030-31 (Capt. O'Connell, State's Witness).

[67] Ex. 1, pp. 669, 673 (Reck). *Cf.*, Ex. 2, pp. 395, 396 (Reck).

[68] Ex. 2, p. 738 (Charles Reck, Defense Witness).

[69] Ex. 2, pp. 738-39 (Charles Reck, Defense Witness).

[70] Ex. 1, pp. 673, 674 (Reck).

statement was not disputed by the State's witnesses. Since Reck was first taken to the hospital at about 7:20 P.M.,[71] it thus appears that Reck's third day of interrogation began between 1:30 and 2:30 on the afternoon of Friday, March 27. At this point, Reck had been incommunicado for some 51 hours.

Early on Friday afternoon, Captain O'Connell, commander of the North Avenue Police District,[72] telephoned Prosecutor Wilbert Crowley and asked that an Assistant State's Attorney be dispatched to North Avenue to assist in interrogating some prisoners.[73] Blair Varnes from the prosecutor's office arrived at the station "about the middle of the afternoon" [74] and stayed with Reck "for about two and a half hours straight" while the police officers examined their prisoner.[75]

Police Officers Reilly, Breen and Bruns also attended Friday afternoon's examination.[76] Captain O'Connell was talking with the captive boys "quite a bit" during this period, too.[77] Police Officer Youhn was present at about 4:30 on Friday afternoon.[78]

By Friday evening, the four boys had become the focus of a major police effort. A "big show-up" was underway.[79] A "big crowd" of people ("a hundred or more") congre-

---

[71] Ex. 1, p. 913; Ex. 2, pp. 922-23 (Officer Reilly, State's Witness).

[72] Ex. 1, pp. 931-32 (Capt. O'Connell, State's Witness).

[73] Ex. 1, p. 964; Ex. 2, pp. 226/45-46 (Crowley, State's Witness).

[74] Ex. 1, p. 425 (Varnes, State's Witness).

[75] Ex. 1, p. 959 (Varnes, State's Witness).

[76] Ex. 1, p. 959 (Varnes, State's Witness).

[77] Ex. 1, p. 939 (Capt. O'Connell, State's Witness).

[78] Ex. 2, p. 1016 (Officer Youhn, State's Witness).

[79] Ex. 2, p. 970 (Officer Kula, State's Witness).

gated in the Station.[80] Reck was being exhibited on the second floor.[81] Shortly after 7:00 P.M. Reck fainted.[82]

Unidentified persons assisted Reck to a bench.[83] Reck "was placed on a stretcher on the second floor and carried downstairs."[84] By 7:20 P.M. Reck was on his way to the Cook County Hospital[85] "in the customary district patrol wagon."[86]

At 7:45 P.M.[87] Reck was brought into the receiving room of County Hospital in a wheel chair.[88] The police officers who delivered Reck told the interne on duty that Reck had experienced an "attack and felt kind of dizzy,"[89] and had suffered "one or two fainting spells."[90] Reck told the in-

---

[82] Ex. 1, p. 124; Ex. 2, p. 401 (Reck). (Officer Kula, State's Witness).

[81] Ex. 1, p. 403 (Sgt. Aitken, State's Witness).

[80] Ex. 2, p. 226/176 (Sgt. Aitken, State's Witness). Ex. 2, p. 971 The time must have been just after 7:00 P.M., because Sgt. Aitken saw Reck in the line-up at 7:00 P.M., and by 7:20 P.M. Reck was on his way to the hospital. See note 81, above, and note 83, below.

[83] Ex. 1, p. 916 (Officer Reilly, State's Witness). According to Reilly, he asked Reck what was the matter, and Reck said: "I am a little constipated and have not went for a couple of days. . . . Oh, I get this way every once in a while." *Ibid.* Compare People's Exhibit 12, the Cook County Hospital Record on Reck: "constipation, none." Ex. 2, p. 1006.

[84] Ex. 1, p. 937 (Capt. O'Connell, State's Witness).

[85] Ex. 1, p. 913; Ex. 2, p. 923 (Officer Reilly, State's Witness).

[86] Ex. 1, p. 937 (Capt. O'Connell, State's Witness).

[87] Ex. 2, p. 954 (Dr. Wilkey, State's Witness).

[88] Ex. 2, p. 959 (Dr. Wilkey, State's Witness).

[89] Ex. 2, p. 958 (Dr. Wilkey, State's Witness).

[90] Ex. 1, p. 944 (Dr. Wilkey, State's Witness). This corroborates Reck's testimony (see note 82) and refutes Officer Reilly's curiously equivocal denial that Reck had fainted. Ex. 2, p. 924 (Officer Reilly, State's Witness).

terne that "he was sick, in pain . . . dizzy."[91] The interne examined Reck and found no marks or bruises on his body.[92] He then concluded that Reck "was not fit for the hospital" and "rejected" him.[93]

Reck was taken directly back to the North Avenue Police Station arriving there at 8:15 P.M.[94] He was placed on exhibition in a show-up.[95] Quite a number of police officers were in the room, together with the latest batch of civilian viewers.[96]

After a short period, Reck became sick[97] and Officer Reilly took him out of the show-up room and into an unfurnished handball court in the rear of the Station's second floor.[98]

Reilly said that he "did not want to have [Reck] annoyed,"[99] and thus Reilly "did not care to show him up to . . . anybody"[100] because he was ". . . feeling careful of [Reck's] feelings. . . ."[101] Therefore, Reilly saw to it

---

[91] Ex. 2, pp. 958-959 (Dr. Wilkey, State's Witness).

[92] Ex. 2, pp. 954-955 (Dr. Wilkey, State's Witness).

[93] Ex. 2, p. 955 (Dr. Wilkey, State's Witness).

[94] Ex. 2, pp. 923, 926 (Officer Reilly, State's Witness).

[95] Ex. 2, p. 927 (Officer Reilly, State's Witness).

[96] Ex. 2, p. 927 (Officer Reilly, State's Witness).

[97] Ex. 2, p. 928 (Officer Reilly, State's Witness).

[98] Ex. 2, p. 928 (Officer Reilly, State's Witness).
Officer Reilly also described the handball court at Ex. 2, pp. 917-18.

[99] Ex. 2, p. 922 (Officer Reilly, State's Witness).

[100] Ex. 2, p. 921 (Officer Reilly, State's Witness).

[101] Ex. 2, p. 922 (Officer Reilly, State's Witness).

that the civilians were kept out of the room.[102] Reilly said he wanted Reck to rest.[103]

But Emil Reck got no rest. Almost immediately, Sergeant Andrew Aitken, assigned to the Peacock murder investigation,[104] entered the handball court.[105] With him were Sergeant Patrick McShane and Patrolman Timothy Donovan.[106] Besides Reck and the three police officers, no one else was in the room, nor did anyone else enter for some minutes.[107]

Aitken and the other officers stayed with Reck "rather uninterruptedly, almost constantly" for the next half-hour.[108] After 15 minutes, Reck was standing near a bench[109] which had been placed in the otherwise bare handball court for the purpose of letting Reck "rest" on it.[110] According to Sergeant Aitken, he then asked Reck the following question:

"Emil, have you seen any motion pictures or read any magazines relative to ballistics? That is the reason

---

[102] Ex. 2, p. 922 (Officer Reilly, State's Witness).

[103] Ex. 2, p. 928 (Officer Reilly, State's Witness).

[104] Ex. 2, p. 226/164 (Sgt. Aitken, State's Witness).

[105] Ex. 2, pp. 226/165-166 (Sgt. Aitken, State's Witness).

[106] Ex. 2, pp. 226/167 (Sgt. Aitken, State's Witness). Officers McShane and Donovan were never called to testify as to the circumstances under which Reck was interrogated in the handball court at this time despite Reck's testimony that he was beaten during this period. Ex. 1, p. 676 (Reck).

[107] Ex. 2, pp. 226/167-68 (Sgt. Aitken, State's Witness).

[108] Ex. 2, p. 226/172 (Sgt. Aitken, State's Witness). This period extended from 8:30 P.M. to 9:00 P.M. *Ibid.*

[109] Ex. 2, p. 226/167 (Sgt. Aitken, State's Witness). Aitken fixed the time as "about 8:45." *Ibid.*

[110] Ex. 2, p. 929 (Officer Reilly, State's Witness).

why you disposed of your revolver for fear it may be traced back to the Doctor Peacock murder"?[111]

Aitken's version of what happened then is as follows:

"With that he sat down and slumped on the bench and became very pale. And I said, 'Are you sick?' A few moments later he answered, 'I am sick.' I says, 'What is wrong?' He says, 'I got some blood sickness while in the C. C. Camps.'"[112]

When Reck "slumped" to the bench, he doubled up forward from the waist.[113]

A Dr. Abraham was called into the handball court.[114] When Dr. Abraham entered the handball court, Reck was "extremely nervous."[115] Reck was also "exposed."[116] His pants were undone.[117] His shirt was unbuttoned and hanging outside of his pants.[118] He was rubbing his abdomen.[119] Dr. Abraham didn't know why Reck was "exposed," and no one told him. Reck told the doctor that he had a pain, pointing to his abdomen.[120] Dr. Abraham "examined" Reck for 30 to 60 seconds.[121]

---

[111] Ex. 2, p. 226/165 (Sgt. Aitken, State's Witness).

[112] Ex. 2, p. 226/166 (Sgt. Aitken, State's Witness).

[113] Ex. 2, p. 226/170 (Sgt. Aitken, State's Witness).

[114] Ex. 2, p. 226/166 (Sgt. Aitken, State's Witness).

[115] Ex 1, pp. 949-50 (Dr. Abraham, State's Witness).

[116] Ex. 1, p. 951 (Dr. Abraham, State's Witness).

[117] Ex. 1, p. 951 (Dr. Abraham, State's Witness).

[118] Ex. 1, p. 952 (Dr. Abraham, State's Witness).

[119] Ex. 1, p. 952 (Dr. Abraham, State's Witness).

[120] Ex. 1, p. 951 (Dr. Abraham, State's Witness).

[121] Ex. 2, p. 503 (Dr. Abraham, Defense Witness).
As a State witness the doctor said his examination took 60 to 90 seconds, but admitted that he did not give Reck the sort of

After Dr. Abraham's 60-second check-up, Reck lay down on the bench.[122] But the police who were present throughout did not allow Reck to rest. When still more people entered the room to question Reck, he was told to get on his feet, and "the color went away from him again."[123] After a while, civilians were brought into the handball court to identify Reck. He was told to get up from the bench when anyone walked in.[124]

By 9:15 P.M. civilians were again being excluded from the handball court.[125] Although there were about fifty other people who were "anxious" to see Reck at this time, Reilly was keeping all of them out of the room.[126] One such person got the impression that he was being given "a run-around" when, after he "pushed through the crowd," the police told him that Reck "was injured"[127] "They told me he was hurt."[128]

Between 9:30 and 9:45 P.M.[129] Reck became ill for the fourth time in three hours. He "bent over and said he felt sick to his stomach" and vomited on the floor.[130] "He was

---

examination that he would have given a private patient with the same complaint. Ex. 1, p. 950 (Dr. Abraham, State's Witness).

[122] Ex. 1, pp. 951-52 (Dr. Abraham, State's Witness).

[123] Ex. 1, p. 949 (Dr. Abraham, State's Witness).

[124] Ex. 1, p. 955 (Dr. Abraham, State's Witness); *Cf.* Ex. 2, pp. 226/173 (Sgt. Aitken, State's Witness).

[125] Reilly was excluding all civilians when Mr. Ruben arrived (Ex. 2, p. 921). Mr. Ruben arrived at 9:15 or 9:30 (Ex. 2, p. 927). (Officer Reilly, State's Witness).

[126] Ex. 2, pp. 921-22, 929 (Officer Reilly, State's Witness).

[127] Ex. 2, pp. 778-79 (Milton Ruben, State's Witness).

[128] Ex. 2, p. 779 (Milton Ruben, State's Witness).

[129] Ex. 2, p. 1009 (Officer Youhn, State's Witness).

[130] Ex. 2, p. 1009 (Officer Youhn, State's Witness).

bleeding from the mouth, in short gushes of blood: . . ." [131] "The blood seemed to come out of the corner of his mouth. . . ." [132] He bled for "two or three minutes." [133] Officer Youhn was present.[134] Officer Larke was also present[135] but was never called to testify despite Reck's testimony of being beaten at this time. Aitken was or was not present, depending upon whether one believes his testimony at the trial or his testimony at the post-conviction hearing.[136]

Dr. Abraham was called to examine Reck again.[137] When Dr. Abraham entered the handball court, he saw Reck lying on a stretcher.[138] Nearby was a pool of Reck's blood on the floor. The blood was "a bright red." [139] It covered an area a "foot square." [140] But Dr. Abraham did not even give Reck a 60-second examination this time.[141]

Minutes later,[142] at about 9:45 P.M.,[143] Reck was carried

---

[131] Ex. 1, p. 405 (Sgt. Aitken, State's Witness).

[132] Ex. 1, p. 412 (Sgt. Aitken, State's Witness).

[133] Ex. 1, p. 413 (Sgt. Aitken, State's Witness).

[134] Ex. 2, p. 1014 (Officer Youhn, State's Witness).

[135] Ex. 2, p. 1014 (Officer Youhn, State's Witness).

[136] *Compare* Aitken's solemn denial that he saw Reck vomit blood or that he was even in the handball court at the time (Ex. 2, pp. 226/175-76, testimony at 1936 trial) *with* Aitken's vivid description of Reck's hemorrhaging when he testified 16 years later. (Ex. 1, pp. 405, 412).

[137] Ex. 2, p. 1012 (Officer Youhn, State's Witness).

[138] Ex. 1, p. 953 (Dr. Abraham, State's Witness).

[139] Ex. 1, p. 954 (Dr. Abraham, State's Witness).

[140] Ex. 1, p. 954 (Dr. Abraham, State's Witness).

[141] Dr. Abraham testified that the only time he ever examined Reck was when he fainted at 8:45 P.M., which was 45 minutes before Reck vomited blood. Ex. 1, p. 950.

[142] Ex. 2, p. 1013 (Officer Youhn, State's Witness).

[143] Ex. 2, p. 1014 (Officer Youhn, State's Witness).

on a stretcher[144] from the handball court to a waiting patrol wagon. Captain O'Connell gave orders to return Reck to the hospital as fast as possible.[145] At this time, according to the official Police Department "History of Sick or Injured Person," Emil Reck had been sick for three hours and was unable to walk without aid.[146] He had been in police custody for 59 hours.

Reck entered Cook County Hospital for the second time at 10:15 P.M. on Friday.[147] Police officers who carried Reck to the hospital informed Dr. Wilkey, the interne on duty at the hospital receiving room, that Reck had vomited blood. The doctor considered Reck, who had been brought in on a wheelchair,[148] an "emergency" case.[149] He made "a superficial examination" and ordered Reck carried to a hospital ward.[150]

After Reck was delivered to a ward, he was interviewed by Dr. Zachary Felsher.[151] The ever-present police informed Dr. Felsher that Reck had been vomiting blood;[152] Reck himself was uncommunicative.[153] Reck received in-

---

[144] Ex. 1, p. 937; Ex. 2, p. 1028 (Capt. [redacted]onnell, State's Witness). Ex. 1, p. 953; Ex. 2, p. 505 (Dr. [redacted]raham, State's and Defense Witness).

[145] Ex. 1, pp. 917-18 (Officer Reilly, State's Witness).

[146] Ex. 2, pp. 1007-08 (People's Exhibit 12).

[147] Ex. 2, p. 1003 (People's Exhibit 12).

[148] Ex. 2, p. 961 (Dr. Wilkey, State's Witness).

[149] Ex. 2, p. 956 (Dr. Wilkey, State's Witness).

[150] Ex. 2, p. 955 (Dr. Wilkey, State's Witness).

[151] Ex. 1, pp. 734-35 (Dr. Felsher, Defense Witness).
Ex. 2, pp. 553-54 (Dr. Felsher, Defense Witness).

[152] Ex. 1, p. 735 (Dr. Felsher, Defense Witness).
Ex. 2, p. 555 (Dr. Felsher, Defense Witness).

[153] Although Felsher questioned Reck for "at least a half hour," Ex. 2, p. 553), Reck was able to tell him only that he had vomited some dark colored blood (Ex. 1, p. 735).

jections of morphine, atropine and ipecac from Dr. Weissman, another hospital physician,[154] who examined Reck but found him "rather uncooperative."[155] Dr. Weissman noticed that small encrustations of blood were present not only around the corners of Reck's mouth,[156] but also around his nostrils.[157] The drug injections were repeated once more during the course of the night.[158]

At about 2:00 A.M. on Saturday, March 28th, two physicians, Dr. Scatliff and Dr. Day, arrived at the County Hospital to view Emil Reck.[159] These gentlemen were members of a Chicago Medical Society committee which was assisting in the Peacock investigation.[160] In an effort to catch the killer, they had been working with the State's Attorney's office since the day Dr. Peacock's body was found, almost three months before.[161] Prosecutor Kearney had telephoned Drs. Scatliff and Day around midnight or 12:30 A.M.[162] Kearney wanted them to see if Reck or any of the other boys "had any marks of brutality or anything on them."[163] Although they had retired for the evening,[164] the doctors wanted to see Reck because they were curious about "police brutality."[165]

---

[154] Ex. 1, p. 716 (Dr. Weissman, Defense Witness).

[155] Ex. 2, p. 538 (Dr. Weissman, Defense Witness).

[156] Ex. 1, p. 716 (Dr. Weissman, Defense Witness).

[157] Ex. 2, p. 1006 (People's Exhibit 12).

[158] Ex. 1, p. 716 (Dr. Weissman, Defense Witness).

[159] Ex. 1, p. 968 (Dr. Day, State's Witness).

[160] Ex. 2, p. 706 (Dr. Day, Defense Witness).

[161] Ex. 1, p. 343 (Kearney, State's Witness).

[162] Ex. 1, pp. 342-43 (Kearney, State's Witness).

[163] Ex. 1, p. 345 (Kearney, State's Witness).

[164] Ex. 1, p. 379 (Dr. Scatliff, State's Witness).

[165] Ex. 1, p. 386 (Dr. Scatliff, State's Witness).

Upon arrival at the hospital, the two doctors found that access to Reck was barred by a police officer stationed in the hallway outside of Reck's room. The guard informed them that no one could see Reck without Captain O'Connell's clearance.[166] The physicians were forced to telephone Captain O'Connell so that he could order the police guard to admit them to Reck's room.[167]

When Drs. Scatliff and Day entered Reck's hospital room, they made only a "cursory" examination of Reck.[168] Reck was asleep, so the doctors did not question him.[169] They felt that they "had no right to go over and make a physical examination of any sort." [170] Therefore they did not examine his abdomen, back, any part of his torso, or his legs.[171] Nor did they look at Reck's hospital chart.[172] The light in the room was inadequate so the two physicians used a small pencil-type flashlight.[173] A police officer was present throughout this "one or two" minute examination.[174]

The Fourth Day:

On Saturday morning Dr. Zachary Felsher of the Cook County Hospital talked with Reck about his condition.[175] This was the first time Reck had conversed with any civilian outside the presence of police officers since his arrest some

---

[166] Ex. 2, p. 705 (Dr. Day, Defense Witness).

[167] Ex. 2, p. 705 (Dr. Day, Defense Witness).

[168] Ex. 2, p. 700 (Dr. Day, Defense Witness).

[169] Ex. 1, p. 970 (Dr. Day, State's Witness).

[170] Ex. 1, p. 972 (Dr. Day, State's Witness).

[171] Ex. 1, p. 969 (Dr. Day, State's Witness).

[172] Ex. 1, p. 970 (Dr. Day, State's Witness).

[173] Ex. 1, pp. 975-76 (Dr. Scatliff, State's Witness).

[174] Ex. 1, p. 969 (Dr. Day, State's Witness).

[175] Ex. 2, p. 556 (Dr. Felsher, Defense Witness).

70 hours before. In the "short time" they were together,[176] Reck told Dr. Felsher that the police had been beating him in the stomach.[177]

Prior to 9:30 A.M.,[178] Reck told Dr. Weissman also that he was in pain,[179] and that he had been beaten in the abdomen and chest over a three-day period.[180]

Reck's physical condition over the first three days of secret interrogation is dispassionately noted in the medical jargon of People's Exhibit 12, the official County Hospital history of Reck:

> ". . . fainting one day, hematamasis once, pain level masogastrium, two days. Patient states that about 2:00 P.M. during afternoon three days ago during a scuffle he was hit several times in the left masogastrium, chest, about the neck; and this occurred two days ago; again second evening he began to notice pain in left masogastrium, sharp, which did not move about; pain continued Thursday the same . . . Friday the pain became worse some time in the afternoon; he felt sick to his stomach, and then fainting. This occurred about 5:00 or 6:00, and finally he had a hematamasis, dark blood, he does not know whether there was any from his nose, he fainted again, and when he was questioned he was taken to Cook County Hospital. The pain was somewhat bad, and the nausea continued with weakness and dizziness. . . ." [181]

---

[176] Ex. 1, p. 734 (Dr. Felsher, Defense Witness).

[177] Ex. 1, p. 736; Ex. 2, p. 557 (Dr. Felsher, Defense Witness).

[178] Captain O'Connell removed Reck from the hospital shortly after 9:30 A.M. Ex. 1, p. 937 (O'Connell, State's Witness).

[179] Ex. 2, p. 539 (Dr. Weissman, Defense Witness).

[180] Ex. 2, p. 541 (Dr. Weissman, Defense Witness).

[181] Ex. 2, pp. 1004-05 (People's Exhibit 12).

At the time when Reck recounted his story of police brutality to the physicians at County Hospital, he had not confessed to the Peacock murder; he had not conferred with any attorney; he had not talked with any member of his family; he had been effectively removed from free communication with the outside world; he could not have been coached.

On Saturday morning Reck's father had attempted to see his son in the hospital. Two police guards refused him admittance to Reck's bedside.[182] Although Reck was still suffering pain on the left side of his abdomen,[183] Captain O'Connell removed Reck from the hospital shortly after 9:30 A.M. in a wheel chair.[184] As soon as he had Reck in his car, O'Connell began questioning him.[185] Reck's fourth day of police interrogation had begun.

O'Connell drove Reck back to the North Avenue Station. He continued to question Reck after they arrived there.[186] O'Connell testified that he spent "possibly, four, five or six hours or so" questioning Reck after wheeling him out of the hospital.[187]

The unrelenting Reilly joined the interrogation of Reck.[188] The questioning was focused on the whereabouts of the

---

[182] Ex. 2, p. 739 (Charles Reck, Defense Witness).

[183] Ex. 2, p. 1006 (People's Exhibit 12); Ex. 2, p. 539 (Dr. Weissman, Defense Witness).

[184] Ex. 1, p. 937; Ex. 2, p. 1029 (Captain O'Connell, State's Witness).

[185] Ex. 1, pp. 940-41 (Captain O'Connell, State's Witness).

[186] Ex. 1, pp. 940-41 (Captain O'Connell, State's Witness).

[187] Ex. 1, p. 940 (Captain O'Connell, State's Witness).

[188] I "never missed sticking right with him" at the North Avenue Station. Ex. 2, pp. 947-48 (Officer Reilly, State's Witness).

pistol which had been used to shoot Dr. Peacock.[189] Robert Goethe, one of the teen-agers who had been arrested with Reck on Wednesday and who had been subjected to a course of interrogation similar to Reck's, had told Reilly on Friday night that Reck had the gun.[190] Questioning about the gun continued through the morning and on into the afternoon at the North Avenue Station.[191] After several hours, Reck was placed in a car and driven to the State's Attorney's office, arriving there around 2:00 P.M.[192] Upon reaching the headquarters of the State's Attorney's staff, Reck was taken to a squad room for continued questioning by O'Connell, Reilly, Susenbeck and others.[193]

Reck was very free with his answers to the recurring questions about the Peacock murder gun. He told the police that the gun was in Lake Michigan at the end of Chicago Avenue.[194] But the police never looked for the gun there.[195] He told the police that he had given the gun to a boy named "Mike" who lived on Thomas Street; the police went house-to-house on Thomas Street but could find no "Mike."[196] He told the police that the gun was secreted "in back of a fence" near a "Chink's place at California and Division" Streets.[197]

---

[189] Ex. 2, pp. 426-28 (Reck).

[190] Ex. 2, p. 945 (Officer Reilly, State's Witness).

[191] Ex. 2, p. 947 (Officer Reilly, State's Witness).

[192] Ex. 2, p. 1023 (Captain O'Connell, State's Witness; Ex. 2, p. 986 (Officer Susenbeck, State's Witness).

[193] Ex. 2, p. 948 (Officer Reilly, State's Witness); Ex. 2, p. 986 (Officer Susenbeck, State's Witness); Ex. 2, p. 412 (Reck).

[194] Ex. 2, pp. 939, 951 (Officer Reilly, State's Witness); Ex. 2, p. 426 (Reck).

[195] Ex. 2, p. 985 (Officer Susenbeck, State's Witness); Ex. 2, pp. 933, 939, 951 (Officer Reilly, State's Witness).

[196] Ex. 2, pp. 981, 985 (Officer Susenbeck, State's Witness).

[197] Ex. 2, p. 406; Ex. 1, p. 664 (Reck).

He told the police that he had given the gun to a boy named "Mattie" whose description, address, or last name he did not know.[198] He told the police that the gun was in his father's basement shed,[199] under a stairway,[200] or in a coal pile.[201] Several officers did go to his home and searched the basement, but they found nothing.[202]

As Captain O'Connell put it, "There had been about three or four stories told of where guns were disposed of . . ."[203] Apparently each of the four murder suspects had his own version of where they had hidden the murder gun. "Their stories did not jibe," said Captain O'Connell, "and there was no use in looking."[204] Therefore, after the futile search for "Mike" and the fruitless ransacking of the Reck basement, the police gave up their search for the murder weapon. The most important piece of evidence to corroborate the challenged confessions was, henceforth, not sought by the authorities. They continued, however, to seek a confession.

At 3:00 P.M., Saturday, the First Assistant State's Attorney of Cook County, Mr. Wilbert Crowley, took up the interrogation of Emil Reck.[205] Reck had been in police custody for 76 hours, but this was the first time Crowley had seen him.[206] Crowley did not interview Reck privately. Police

---

[198] Ex. 2, p. 935 (Officer Reilly, State's Witness).

[199] Ex. 2, p. 932 (Officer Reilly, State's Witness).

[200] Ex. 2, p. 935 (Officer Reilly, State's Witness).

[201] Ex. 2, p. 405 (Reck).

[202] Ex. 2, p. 1030 (Captain O'Connell, State's Witness).

[203] Ex. 2, p. 1030 (Captain O'Connell, State's Witness).

[204] Ex. 2, p. 1030 (Captain O'Connell, State's Witness).

[205] Ex. 2, p. 226/4 (Crowley, State's Witness).

[206] Ex. 2, p. 226/4 (Crowley, State's Witness).

Captains O'Connell and Horan were present from the beginning of the session.[207] Also present were Assistant State's Attorneys Blair Varnes and Marshall Kearney.[208] Later, Chief of Detectives John Sullivan joined the crew of interrogators.[209]

Crowley launched directly into questioning Reck about the Peacock case. He did not warn Reck that his answers might be used against him and did not inform Reck of his right to counsel or of any other of his constitutional rights.[210]

Reck denied any connection with the Peacock murder and any knowledge concerning it.[211] The interrogation then turned to "other matters."[212]

After about 15 minutes, Prosecutor Crowley returned to the Peacock murder.[213] Reck still denied participating in the murder but admitted that Goethe had told him about it.[214]

Finally, at some point between 4:00 and 4:30 P.M., after more than an hour of insistent questioning by Crowley, Reck was taken into Prosecutor Kearney's office.[215] There he was confronted by Durland Nash, Robert Goethe, Officer Reilly, Prosecutor Varnes, Prosecutor Kearney, Prosecutor Crowley, Chief of Detectives Sullivan, Captain Horan, Captain

---

[207] Ex. 2, p. 226/4 (Crowley, State's Witness).

[208] Ex. 2, p. 226/4 (Crowley, State's Witness).

[209] Ex. 2, p. 332 (Chief Sullivan, State's Witness).

[210] Although his testimony was very detailed, Crowley never stated that he had informed Reck of his rights. See Ex. 2, pp. 226/5-226/12 (*passim.*) (Crowley, State's Witness).

[211] Ex. 2, p. 226/5 (Crowley, State's Witness).

[212] Ex. 2, p. 226/5 (Crowley, State's Witness).

[213] Ex. 2, p. 226/5 (Crowley, State's Witness).

[214] Ex. 2, p. 226/5-6 (Crowley, State's Witness).

[215] Ex. 2, p. 332 (Chief Sullivan, State's Witness).

O'Connell, and a few other police officers.[216] After Reck, Crowley, and their coterie of police officers entered Prosecutor Kearney's office, Durland Nash was instructed by Crowley to "tell Reck what you have told us about the Peacock case."[217] Nash then told the story which, with embellishments, became his signed confession to the Peacock murder.[218] When Nash finished his account, Reck again denied participation in the crime.[219]

Crowley then turned to Robert Goethe and secured from him a statement that Nash was telling the truth and that Reck had participated in killing Dr. Peacock.[220] Goethe then urged Reck to confess. At this juncture, Reck apparently stated that he had been present when Dr. Peacock was killed but had not struck Peacock in accordance with the story told by Nash and adopted by Goethe.[221] When further pressed by Crowley, Reck stated that Michael Livingston, and not he, had been the one who clubbed Dr. Peacock.[222] The questioning was stopped as Crowley ordered that Livingston be brought into the room.[223] Reck was now confronted not only with a roomful of police and prosecutors but also with the three other boys who had already confessed. Prosecutor Crowley abruptly left the room announcing he had an appointment.[224]

---

[216] Ex. 2, p. 226/8 (Crowley, State's Witness).

[217] Ex. 2, p. 226/9 (Crowley, State's Witness).

[218] Ex. 2, p. 226/9-10 (Crowley, State's Witness).

[219] Ex. 2, p. 226/10 (Crowley, State's Witness).

[220] Ex. 2, p. 226/10 (Crowley, State's Witness).

[221] Ex. 2, p. 226/11 (Crowley, State's Witness).

[222] Ex. 2, p. 226/11 (Crowley, State's Witness).

[223] Ex. 2, p. 226/12 (Crowley, State's Witness).

[224] Ex. 2, p. 226/12 (Crowley, State's Witness); Ex. 2, p. 333 (Chief Sullivan, State's Witness).

Livingston immediately accused Reck of having been the one who struck Dr. Peacock with a club.[225] A great deal of conversation followed this accusation, but the only prosecution witness who testified concerning this particular period could not remember any of it.[226] Finally, according to the Chief of Detectives Sullivan, Reck said "Well, I might as well tell I was there." [227]

The police and prosecutors made immediate arrangements for a stenographically recorded joint statement to be taken.[228] The joint statement commenced at 5:55 P.M. on Saturday, March 28th.[229] Reck, Nash, Goethe, Livingston, Prosecutor Kearney, Prosecutor Varnes, Chief of Detectives Sullivan, Captain O'Connell, Captain Horan, Lieutenant Kelley and the ubiquitous Officer Reilly assembled in an office at the State's Attorney's headquarters for the event.[230] A shorthand reporter employed by the State's Attorney's office, Isaacson, was present to record the proceedings.[231]

Isaacson testified that when he saw Reck on Saturday at the joint confession, "I could see he was sick . . . his face was ashen color, and he did not look well, just sick." [232] Reck was "very pale";[233] his face was "white and sick

---

[225] Ex. 2, p. 333 (Chief Sullivan, State's Witness).

[226] Ex. 2, p. 334 (Chief Sullivan, State's Witness).

[227] Ex. 2, p. 334 (Chief Sullivan, State's Witness).

[228] Ex. 2, p. 334 (Chief Sullivan, State's Witness).

[229] Ex. 1, p. 587 (Isaacson, State's Witness).

[230] Ex. 1, p. 586 (Isaacson, State's Witness).

[231] Ex. 1, p. 585 (Isaacson, State's Witness).

[232] Ex. 1, pp. 590, 591 (Isaacson, State's Witness).

[233] Ex. 1, p. 593 (Isaacson, State's Witness).

looking."[234] He "walked weakly."[235] At this point Reck had been in custody almost 80 hours without counsel, without contact with his family, without a court appearance and without charge or bail.

Chief of Detectives John L. Sullivan aptly described the procedure followed in the taking of the so-called "joint confession":

> Chief Sullivan: Nash did most of the talking, as I remember, and the others acquiesced with what he said.
>
> Q. And by "acquiesced," just what do you mean? A. They agreed that what he said was so.
>
> Q. And by agreed, do you mean Emil Reck said, "Yes, I agree, that is true"? A. Not in so many words.
>
> Q. What were the words he used, if you remember? A. Why, the acquiescence, I think was, Mr. Kearney now and then would say, "Is that right, Livingston?" and Livingston would say, "Yes"; and he would say, "Is that right, Reck?" and Reck would say, "Yes" . . .[236]

The text of the "joint confession" conclusively verified Chief Sullivan's recollection on this point. The extent to which Reck volunteered information in the course of the ceremony can be best assessed by setting forth, *verbatim*, Reck's answers. After identifying themselves and being

---

[234] Ex. 1, p. 594 (Isaacson, State's Witness).

[235] Ex. 1, p. 593 (Isaacson, State's Witness).
This testimony about Reck's physical appearance was given by Isaacson outside the presence of the murder trial jury, during the hearing on Reck's motion to suppress the confessions. Six days later, after Reck's motion to suppress had been denied, Isaacson testified in the presence of the jury. This time Isaacson did an astonishing about-face and denied that he had ever seen Reck looking ill. See Ex. 2, pp. 226/149-151 (Isaacson, State's Witness).

[236] Ex. 2, p. 335 (Chief Sullivan, State's Witness).

formally cautioned, the boys were asked if they remembered the "incident" involving Dr. Peacock. Reck's responses, without the questions and responses of the other boys, follow:

> Emil Reck: "Do I know the case? . . . Pretty good. . . . I am. . . . Yes.[237] . . . Yes, sir. . . . Yes, sir. . . .[238] No. . . . Yes. . . . Yes, sir. . . ." [239]

(Three pages of questions and answers here intervene, Reck remaining silent throughout.)[240]

> "I went home and ate. . . . How far? . . . Three blocks. . . . Yes. . . . Yes . . . Yes. . . . I went with them. . . . Yes. . . . Yes. . . ." [241]

(One page intervenes, Reck remaining silent.)[241a]

> "Yes, sir. . . .[242] Yes, sir. . . ." [243]

(Three pages intervene, Reck remaining silent.)[244]

> "I was across the street. . . . No. . . .[245] . . . Yes. . . ." [246]

---

[237] p. 282 (Citations in notes 237 to 271 are all to Exhibit 2 of the Record).

[238] p. 283.

[239] p. 284.

[240] pp. 285-87.

[241] p. 288.

[241a] p. 289.

[242] p. 290.

[243] p. 291.

[244] pp. 293-94.

[245] p. 294.

[246] p. 295.

(One and one-half pages intervene, Reck remaining silent.)[247]

". . . . Yes." [248]

(One page intervenes, Reck remaining silent.)[249]

". . . Yes. . . . Back seat. . . .[250] . . . I did not have any weapon. . . . No. I do not see where they say I had a weapon. . . . A club. . . . A club, a wooden one. . . . About fourteen inches. . . . It was just straight. Straight, you know, like a broom handle, from a broom, straight. . . . You know wide, as round as a broom handle. . . . Back pocket. . . . " [251]

(Two and three-quarter pages intervene, Reck remaining silent.)[252]

"I do not know, all I know I sat in the back. . . . Yes. . . . Yes. . . . " [253]

(One and three-quarter pages intervene, Reck remaining silent.)[254]

". . . Sitting in the seat. . . . " [255]

---

[247] pp. 295-96.

[248] p. 296.

[249] p. 297.

[250] p. 298.

[251] p. 299.

[252] pp. 300-302.

[253] p. 302.

[254] p. 303.

[255] p. 304.

(One and one-half pages intervene, Reck remaining silent.)[256]

". . . Calling him names? . . . I am not sure of calling him names. . . .[257] . . . I was behind him. . . . Yes. . . .[258] . . . Yes. . . . Yes.[259] I don't remember hitting him. . . . He was dead. . . .[260] . . . He was dead. . . . Once. . . . Once. . . . Yes. . . .[261] . . . Yes.[262] . . . Yes. . . . Yes. . . . Yes, I said. . . . The back. . . .[263] . . . Yes. . . . I threw it on the seat and half of it got on the Doctor. . . . Yes. . . . Yes. . . . On his shoulder. . . .[264] . . . Yes. . . . I looked in it and left it there. . . . Nothing. . . . No, it was not empty, but I just looked at it. I did not want to take nothing out. . . . No, nothing but a knife. . . . I threw it away. . . . I cannot remember. Just picked it up and looked at it and threw it away. . . .[265] Yes. . . . Into the car he was driving. . . .[266] . . . In the back door. . . . Yes. . . . Next to the street. . . . I think I did. . . . Grip? I must have stumbled and threw it over like in the front. . . . Yes. . . . Yes. . . .[267] I think two or three pockets. . . . Twenty. . . . Yes. . . . Five. . . . Yes, sir, five dollars. . . ."[268]

---

[256] pp. 304-306.
[257] p. 306.
[258] p. 307.
[259] p. 308.
[260] p. 309.
[261] p. 310.
[262] p. 311.
[263] p. 312.
[264] p. 313.
[265] p. 314.
[266] p. 315.
[267] p. 316.
[268] p. 317.

(Two pages intervene; Reck is silent.)[269]

"Yes. . . . Yes, sir. . . ."[270] . . . Yes. . . ."[271]

It should be also noted that at the key points in this "confession" Reck made mistakes and was then led into correcting himself. For example, Reck first stated that he had no weapon at the time of the Peacock killing. His interrogator then suggested to him that he had had a club, and Reck fell in with the suggestion.[272] Reck also stated initially that he did not recall hitting Dr. Peacock.[273] But, after a highly suggestive colloquy between the interrogator and Nash, and two unresponsive answers by Reck, the question was finally answered to the interrogator's satisfaction.[274]

Not a single question was asked concerning the disposition of the revolver which, according to the confession, had been used to shoot Dr. Peacock. No hint as to its whereabouts was requested of or volunteered by Reck who, according to Goethe, last had the gun.[275] It should be noted also that Prosecutor Crowley, in recounting his interrogation of Emil Reck earlier on Saturday afternoon, was able to recall, almost word-for-word, every single statement of Emil Reck except one:

"When we concluded, Captain O'Connell I guess then asked him what he did with the gun; and I don't know

---

[269] pp. 318-19.

[270] p. 320.

[271] p. 321.

[272] Ex. 2, p. 299 (Joint Confession).

[273] Ex. 2, p. 309 (Joint Confession).

[274] Ex. 2, pp. 309-10 (Joint Confession).

[275] Ex. 2, p. 277 (People's Exhibit 8, Goethe's Confession).

what he told, whether he answered that question, but I couldn't tell you just what his answer was at that particular time. I know he told me something about the gun. . . ." [276]

The State was not only unable to find the elusive pistol; it was also beginning to forget all about it.

The interrogation also shied away from the automobile which was necessary to transport the four boys from their neighborhood to the scene of the murder and back. None of the four boys acknowledged ownership of the vehicle. No one confessed stealing it. The police apparently made no effort to find it. The car conveniently materialized at the beginning of the alleged trip across the City of Chicago and vanished at the end.

It took two hours to complete taking the joint confession.[277] The State's Attorney's court reporter then left to transcribe his stenographic notes.[278] After transcription, the joint confession was taken to Prosecutor Crowley who, late on Saturday night, March 28th, had it signed by the boys.[279] Captain O'Connell, Officer Susenbeck, Chief Sullivan, Captain Horan, Prosecutor Kearney, and Officer Reilly were also present.[280]

The record is silent as to the further activities of the boys on Saturday night or early Sunday morning. We do not know whether they were permitted to sleep or whether they were subjected to further interrogation and show-ups. Reck himself was unable to give any coherent account of

---

[276] Ex. 2, pp. 226/7-8 (Crowley, State's Witness).

[277] Ex. 2, pp. 226/43 (Crowley, State's Witness).

[278] Ex. 2, pp. 226/144 (Isaacson, State's Witness).

[279] Ex. 1, p. 961 (Crowley, State's Witness).

[280] Ex. 2, p. 986 (Officer Susenbeck, State's Witness).

what happened on Saturday night or Sunday morning,[281] and the State volunteered no information concerning this period. It does appear, however, that at some point on Sunday morning Reck was back in the by-now familiar handball court at the North Avenue Station.[282]

The Fifth Day:

On Sunday, March 29th, Reck was interrogated in the State's Attorney's offices. The questioning was conducted by Assistant State's Attorneys,[283] but Captain O'Connell spent part of Sunday afternoon and evening with Reck, also.[284]

At 3:05 P.M., an individual statement was being taken from Livingston.[285] At 4:10 P.M. it was Reck's turn and Prosecutors Kearney and Varnes began taking his individual statement. Sergeant Albert Bruns from the North Avenue Station was present.[286] This confession was merely a reiteration of the joint statement. Again, nothing whatsoever was asked concerning either the pistol or the car.

Reck's individual confession was completed at 4:40 P.M.[287] He had now been in police custody for 102 hours.

While the individual confessions were being transcribed, Crowley made telephone calls to several ex-grand jurors and to members of the "doctor's committee." Crowley in-

---

[281] See, for example, Ex. 1, p. 689; Ex. 2, pp. 408, 415, 416 (Reck).

[282] Ex. 2, p. 392 (Reck).

[283] Ex. 2, p. 953 (Officer Reilly, State's Witness).

[284] Ex. 1, p. 940 (Capt. O'Connell, State's Witness).

[285] Ex. 2, p. 243 (People's Exhibit 6).

[286] Ex. 2, p. 226/123 (Harvey, State's Witness).

[287] Ex. 2, p. 226/32 (Crowley, State's Witness).

vited these men to be present for a signature ceremony Sunday night.[288]

As each of the four boys finished his individual statement on Sunday afternoon, Crowley had him escorted to the County Jail so that he could be cleaned up and given fresh clothes for the impending ritual.[289] Thus, when the civilian witnesses, who were previously briefed by Crowley,[290] later observed the youthful prisoners on Sunday night, they remarked that the boys seemed well cared for, were clean, and had clean clothes.[291]

The four prisoners were led into Captain Dan Gilbert's office. Three prosecutors, two police captains, one police lieutenant, the Chief of Detectives and several other detectives, as well as the stenographer, confronted them.[292] Also present but seated along the wall at the boys' rear were approximately 12 civilians.[293] The individual statements were read to the boys; they were cautioned; and the confessions were signed.[294]

At the beginning of the ceremony, the boys were introduced to the police officers and state's attorneys present but not to the civilians behind them.[295] Everyone was wearing civilian clothes, and there was nothing to distinguish the civilians from the police.[296] The boys were not in-

---

[288] Ex. 2, p. 226/16 (Crowley, State's Witness).

[289] Ex. 2, p. 226/16 (Crowley, State's Witness).

[290] Ex. 2, p. 226/18 (Crowley, State's Witness).

[291] Ex. 2, p. 226/85 (Landon, State's Witness); Ex. 2, p. 226/68 (Munnecke, State's Witness).

[292] Ex. 2, p. 226/24-25 (Crowley, State's Witness).

[293] Ex. 2, pp. 226/18, 24-25 (Crowley, State's Witness).

[294] Ex. 1, pp. 556, 558-59 (Harvey, State's Witness).

[295] Ex. 1, p. 577 (Harvey, State's Witness).

[296] Ex. 2, p. 226/26-29 (Crowley, State's Witness).

formed that there were any civilians in the room.[297] They had no conversation with them.[298] No one asked them whether they had been beaten.[299] No member of their families was present, nor was counsel for any of the prisoners there. Reck's father had gone to the building on Sunday, but he was not permitted to see his son.[300]

At the time he signed the second confession Reck had been a prisoner for approximately 105 hours.

At the time Reck signed the second confession, he had been without solid food for at least 48 hours. The last solid food given Reck was an egg sandwich on Friday at the North Avenue Station.[301] This must have occurred prior to 7:00 P.M. on Friday because from that time until Reck's second trip to Cook County Hospital, almost every moment is accounted for and there is no mention of food. When Reck was taken to the hospital on Friday night, the doctors prescribed a milk diet for him.[302] Reck was still on his milk diet on Sunday afternoon.[303] He was still on his milk diet after the signature ritual was completed on Sunday night.[304]

---

[297] Ex. 2, pp. 226/26-29 (Crowley, State's Witness).

[298] Ex. 2, p. 226/133 (Harvey, State's Witness).

[299] Ex. 2, p. 226/81 (Munnecke, State's Witness).

[300] Ex. 2, p. 742 (Charles Reck, Defense Witness). Crowley corroborated Charles Reck's testimony of being in the building on Sunday but could not recall whether Charles Reck was permitted to see his son. Ex. 1, p. 351 (Crowley, State's Witness).

[301] Ex. 2, p. 973 (Officer Kula, State's Witness).

[302] Ex. 2, p. 226/30 (Crowley, State's Witness); Ex. 1, p. 812 (Livingston, Defense Witness).

[303] Ex. 2, pp. 226/30, /35, /37 (Crowley, State's Witness); Ex. 2, p. 718 (Dr. Day, Defense Witness); Ex. 1, p. 576 (Harvey, State's Witness).

[304] Ex. 1, p. 576 (Harvey, State's Witness); Ex. 2, p. 718 (Dr. Day, Defense Witness).

There is not one word of testimony in the voluminous record which discloses that Reck had so much as one ounce of solid food during this 48-hour period.

The Sixth, Seventh and Eighth Days:

There is nothing in the record concerning Monday, Tuesday and Wednesday, March 30th through April 1st, except that we know that Reck was still in custody. The State never introduced evidence justifying or explaining its decision to hold Reck without preliminary hearing for three days after he had "voluntarily" confessed to a murder. Reck was taken on a re-enactment of the crime on the Monday night after the signature ceremony.[305] Curiously, the State did not disclose whether or not Reck played his role well.

The Ninth Day:

Reck was not brought before a magistrate prior to Thursday, April 2nd.[306] He had been in police custody at least eight full days. He had not seen his father, any of his other relatives, or any lawyer (except, of course, prosecuting attorneys) during this period.[307]

Postscript:

Shortly after his admission to County Jail after arraignment, Reck was treated for "kidney trouble" at the Northwestern University Clinic.[308]

---

[305] Ex. 1, pp. 407, 416 (Sgt. Aitken, State's Witness). The other three boys participated in a "partial" re-enactment at 4:00 A.M., Saturday (Ex. 2, p. 226/40, Crowley, State's Witness), approximately 12 hours before they outlined Reck's role to him to induce his participation in a joint confession.

[306] Ex. 1, p. 280 (Reck).

[307] Ex. 1, p. 280 (Reck).

[308] Ex. 1, p. 30 (Behavior Clinic Report).

At his trial, Reck was still sick and had to be temporarily excused from the stand and examined by a doctor.[309]

After his conviction, Reck was operated upon for a double hernia at the Menard Penitentiary, November 6, 1937.[310] He had sustained no injuries and had been in no accidents between the time of his second hospitalization on March 27, 1936, and the date of his operation.[311] No explanation of this operation was attempted by the State in the post-conviction hearing.

Controverted evidence of physical brutality inflicted by police officers upon Emil Reck:

Reck testified at length to beatings inflicted upon him in the North Avenue Police Station on Wednesday,[312] Thursday,[313] Friday,[314] and Saturday[315] by Reilly,[316] Susenbeck,[317] Kula,[318] Captain O'Connell,[319] and other police officers.[320] Reck was battered by blows to his stomach and subjected

---

[309] Ex. 1, pp. 661-62.

[310] Ex. 1, pp. 281-83 (Reck).

[311] p. 283 (Citations in note 311 through 320 are to Reck's testimony in Exhibit 1 of the Record).

[312] pp. 619-52.

[313] pp. 661-66, 673.

[314] pp. 675-76.

[315] p. 684.

[316] pp. 624, 627, 641, 644.

[317] pp. 260, 639, 650, 656.

[318] pp. 638, 642, 645.

[319] pp. 662-63, 684.

[320] p. 676. These officers were apparently Aitken, Donovan, McShane (see text at notes 105-07, above) Youhn and/or Larke (see text at notes 134-35, above).

to various other tortures and beatings. His testimony, although naively phrased, is replete with vivid circumstantial detail as to the techniques of police brutality employed.

Michael Livingston confirmed Reck's story of physical violence. He saw Officer Susenbeck attack Reck on Wednesday.[321] Livingston didn't see Reck again until Saturday afternoon at the State's Attorney's office and thus could not testify to the beatings of Thursday, Friday and Saturday morning.[322]

Robert Goethe and Durland Nash—both of whom had already been sentenced after a plea of guilty to the Peacock murder and were brought back from the penitentiary to testify[323]—also corroborated Reck's account of the police tortures inflicted upon him.

Goethe testified that on Wednesday afternoon he saw police officers lead Reck into the back room at the North Avenue Station and that shortly afterwards he heard Reck screaming "Please don't do it." Goethe heard Reck screaming for some five minutes. Then there was silence for a moment followed by more screams. When Reck was escorted from the back room a little later, Goethe noted that Reck looked like he had been crying.[324]

Nash testified that, at one point during Reck's ordeal, he saw Reck being taken by the police into this same back room. He heard Reck cry "Don't Don't Don't" repeatedly over a ten-minute period. He heard noises that "sounded like somebody was getting slapped in the face." Then

---

[321] Ex. 1, pp. 803-04 (Livingston, Defense Witness).

[322] Ex. 1, p. 805 (Livingston, Defense Witness).

[323] Ex. 1, pp. 882, 901 (Stipulations).

[324] Ex. 1, pp. 865-71 (Goethe, Defense Witness).

Nash heard the sound of someone moaning. When the door was opened, Nash saw Reck "pass out." [325]

Of course, all the police denied beating Reck.[326]

Summary of Argument

Petitioner's confessions were the product of coercion—mental and physical—and their use against him at his trial violated his rights under the due process clause of the Fourteenth Amendment.

I.

Mental or psychological coercion is established by the uncontroverted facts in the Record. That Petitioner was subjected to overwhelmingly coercive police pressures designed to elicit a confession is demonstrated by the circumstances of Petitioner's long secret detention, subjection to relentless interrogation, and isolation from friends, family and counsel, his violent illness, vomiting of blood, emergency hospitalization, and inadequate diet. The circumstances of Petitioner's youth, ignorance, limited education, low intelligence, and lack of experience with the police or courts demonstrate that Petitioner's capacity for resistance to police pressures was slight or non-existent. When these circumstances of pressure are weighed against Petitioner's powers of resistance, it becomes clear that Petitioner's will was overborne and his confessions were coerced.

---

[325] Ex. 1, pp. 887-90 (Nash, Defense Witness).

[326] Ex. 1, pp. 290-92, 905-08 (Reilly); Ex. 1, pp. 921-23 (Kula); Ex. 1, pp. 927-31 (Susenbeck); Ex. 1, pp. 932-34 (O'Connell); Ex. 1, p. 407 (Aitken); Ex. 2, p. 1009 (Youhn). Although officers Donovan, McShane and Larke were present when Reck was allegedly beaten (see note 320, above), they were never called by the State to deny the beatings.

II.

Physical coercion is established by the uncontroverted facts of Petitioner's physical condition, by his detailed, consistent and corroborated account of police brutality, and by the failure of the State otherwise to explain his complete physical collapse while in police custody.

III.

The Court of Appeals majority ignored the six applicable decisions of this Court. It relied upon three other decisions which are clearly inapposite because they involved defendants who were far stronger and subjected to far less pressure than Petitioner. The Court of Appeals majority ignored or distorted the crucial evidentiary facts establishing psychological and physical coercion.

IV.

The District Court erred in its holding that the coerced confession decisions of this Court were intended to be applied only prospectively, in considering the irrelevant factors of Reck's assumed guilt and his assumed status as a menace to society, and in ignoring the absence of any credible evidence in the record tending to establish these "facts."

ARGUMENT

If either of the two confessions introduced in evidence against Emil Reck at his murder trial were coerced, then the Fourteenth Amendment requires that his conviction be set aside, regardless of the sufficiency of other evidence, if any, to sustain the conviction. *Malinski* v. *New York*, 324 U.S. 401, 404 (1945); *Payne* v. *Arkansas*, 356 U.S. 560, 568 (1958).

I.

Emil Reck's Confessions Were the Product of Psychological Coercion.

In determining whether a confession is the product of psychological coercion and thus invalidated by the due process clause, this Court has traditionally weighed "the circumstances of pressure against the power of resistance of the person confessing." *Fikes* v. *Alabama*, 352 U.S. 191, 197 (1957). The following six decisions of this Court compel the conclusion that Reck's confessions were the product of psychological coercion:

Blackburn v. *Alabama*, 361 U.S. 199 (1960);
Spano v. *New York*, 360 U.S. 315 (1959);
Fikes v. *Alabama*, 352 U.S. 191 (1957);
Turner v. *Pennsylvania*, 338 U.S. 62 (1949);
Watts v. *Indiana*, 338 U.S. 49 (1949);
Haley v. *Ohio*, 332 U.S. 596 (1948).

This conclusion follows from the fact that (1) Reck was at least as susceptible to coercive police pressures as any of the defendants in the six cited cases except *Blackburn*; and (2) the pressures exerted upon Reck by his captors were at least as coercive as those endured by the defendants in all six cited cases.

(1) "... *The power of resistance of the person confessing.*"

The 19-year-old Reck, with no previous arrests and the intelligence of a child of ten, was more vulnerable to police coercion than the 26-year-old longshoreman in *Turner* (See No. 107, O.T. 1948, Record p. 111a) who had been characterized by the trial judge not as a person with a "low degree of intelligence" but as a "smart, clever individual." (No. 107, O.T. 1948, Record p. 276.) Similarly, Reck was more vulnerable than the 27-year-old "thick-headed" ex-convict involved in the *Fikes* case (352 U.S. at 193), or the ex-convict, Navy veteran, truck driver who was the defendant in *Watts*. (See No. 610, O.T. 1948, Respondent's Brief, pp. 18, 25, 39.) Surely Reck, a "weakling" who cried "pretty easily" (Ex. 1, pp. 27, 882), did not have the "power of resistance" of the defendant in *Spano*, who, although undoubtedly dull and "emotionally unstable" (360 U.S. at 322 n. 3), was still strong and bold enough to fight a professional boxer. 360 U.S. at 316. Even the 15-year-old defendant in *Haley* appears to have been some years ahead of Reck in mental age: Reck was 16 when he dropped out of the seventh grade (Ex. 1, p. 15); Haley was a senior in high school at age 15. 332 U.S. at 608.

(2) "... *The circumstances of pressure....*"

Reck's eight-day ordeal at the hands of the police was more exhausting than anything suffered by the defendants in *Fikes*, *Watts*, *Turner*, *Haley*, *Spano* or *Blackburn*. The eighty-hour secret detention of Emil Reck which preceded his first confession was more than fifteen times as long as the detention of Haley; it was ten times the length of Spano's pre-confession imprisonment and at least nine times as long as the detention in *Blackburn*. Although Reck's pre-confession detention was shorter than those involved in

Fikes, Watts, and *Turner,* it must be noted that in none of those cases did the defendant suffer anything remotely approaching Reck's physical collapse on the third night of his interrogation.

The shocking character of the police treatment of Emil Reck is highlighted when it is compared with the relatively gentle ministrations of the New York police condemned in *Spano.* Vincent Spano had consulted with and been advised by counsel prior to his interrogation and was brought before a judge within 15 minutes of the time that the first court with appropriate jurisdiction was open after his arrest. After only eight hours of detention and some cajolery by a policeman friend, Spano confessed. Spano, unlike Reck, never fainted, hemorrhaged, or vomited blood; he was never carried to a hospital in a stretcher or returned to the police in a wheel chair. Spano was not "white and sick looking" (See text at note 234, *supra*) when he confessed, and his condition did not require a special milk diet. No drugs had been injected into Spano's body. He had not been grilled about "every crime that was committed in the District." (See text at notes 61-63, *supra.*) Yet this Court held that the use by the State of Spano's confession violated the due process clause because his "will was overborne by official pressure, fatigue and sympathy falsely aroused . . ." *Spano* v. *New York,* 360 U.S. at 323.

During the 24 hours preceding his first confession and the 48 hours preceding his second, Reck received no solid food whatsoever. Of the six cases in point, only *Watts* reveals a defendant weakened by hunger. 338 U.S. at 53. Spano, who was held by the police for only 15 hours, received, after four hours, a meal which consisted of nearly as much food as Reck received in four days. 360 U.S. at 318.

In *Watts,* as here, the defendant was first conditioned by police pressures and then turned over to an experienced

prosecutor, to whom he finally capitulated and confessed. 338 U.S. at 53. Spano was treated more gently than Reck or Watts but, like them, ultimately made his coerced confession to a prosecutor with whom he had initially refused to cooperate. See 360 U.S. at 317-19.

In *Spano* the police secured their confession and ceased to badger the defendant. Emil Reck was not so fortunate. Within hours of his first confession Reck was back in the handball court at the North Avenue Station. Later, "Reck was again interrogated at the State's Attorney's office. . . ." (R. 30; Petition for Certiorari, Appendix C, p. 17; 172 F. Supp. at 738.) A second confession was obtained from Reck and signed Sunday night, 102 hours after his imprisonment began. Even this was not the end. Reck was held incommunicado for four more days before he was brought to court on the ninth day of his detention.

Such additional post-confession detention should in this case, as it did in *Haley* v. *Ohio*, lead a federal court to "take with a grain of salt" the "present apologia" of the police that the interrogation was conducted in a "fair and dispassionate manner." 332 U.S. at 600. The acts of the police in repeatedly turning Reck's father away from his injured son's hospital door and police station cell show, as in *Haley*, "such a callous attitude of the police towards the safeguards which respect for ordinary human relationships compels" that this Court should again be "darkly suspicious" of what went on behind the closed doors which barred all disinterested outsiders. 332 U.S. at 600.

II.

Emil Reck's Confessions Were the Product of Physical Coercion.

Emil Reck's confessions were coerced not only by the "sophisticated" methods described in *Spano*, 360 U.S. at 321, but also by the tactics of physical brutality outlawed in *Brown* v. *Mississippi*, 297 U.S. 278 (1936). Although the District Court evaded making a specific finding on the issue of physical brutality, it recognized the force of the evidence on this issue when, after summarizing the undisputed facts, it stated that this evidence "carries an unexpressed import of police brutality, which brutality, unfortunately, does exist in our society" (R. 31; Petition for Certiorari, Appendix C, p. 18; 172 F. Supp. at 738). The District Court went on to note that Reck's "testimony of police brutality" was corroborated by additional direct testimony and circumstantial evidence (R. 42; Petition for Certiorari, Appendix C, p. 26; 172 F. Supp. at 742). Further, the District Court aptly pointed out that the police denials of brutality were entitled to little, if any weight, saying:

> "*If there had been brutality, the police would not be quick to admit it since then not only would the confession have been barred but the police would also have been guilty of a felony*" (R. 47; Petition for Certiorari, Appendix C, p. 29; 172 F. Supp. at 743).

The medical testimony in the record supplies convincing proof that Reck was beaten by the police. At the trial, doctors testified that Reck's hemorrhaging, vomiting, fainting and pain could have been caused by beating (R. 48; Petition for Certiorari, Appendix C, p. 30; 172 F. Supp. at 744). Another doctor, *testifying for the State*, stated that he saw Reck in the police station "exposed," with his pants

open at the waist, his shirt open and hanging down outside his pants, his hand rubbing his abdomen and, later, a pool of bright red blood on the floor (R. 8, 42; Petition for Certiorari, Appendix C, pp. 15-16, 26; 172 F. Supp. at 737, 742). The District Court observed that:

> "At 9:00 A.M. on Saturday, Reck told Dr. Zachary Felsher of the Cook County Hospital that the police had been beating him in the stomach. He also told Dr. Weissman of the same hospital that he had been beaten in the abdomen and chest over a three-day period. This was the first time since his arrest some 70 hours before that Reck had conversed with any civilian outside the presence of police officers" (R. 28; Petition for Certiorari, Appendix C, p. 16; 172 F. Supp. at 737).

This testimony was given by two physicians who were employees of the County of Cook at the time they examined Reck and testified in court (Dr. Felsher, Ex. 2, pp. 551-52, 556-57, Ex. 1, pp. 735-36; Dr. Weissman, Ex. 2, pp. 526, 541). Their testimony is verified by the official hospital record prepared contemporaneously with Reck's physical examination, which was introduced into evidence and vouched for by the prosecution (Ex. 2, p. 1004). These repeated accounts of police torture were given by Reck to the two physicians nine hours before Reck made his first confession. They were made six days before Reck was permitted any contact with his family, friends, or attorney. They were made by a prisoner with the intelligence of a ten-year-old child who could not have known that he was going to confess nine hours later and can hardly be assumed to have understood in advance the possible legal consequences of his charges of brutality.

Reck's account of his torture by the police was corroborated not only by his co-defendant Livingston but also by

Nash and Goethe, who had no motive to lie on Reck's behalf. They had already been sentenced for the Peacock killing. If they had any motive to lie, it would have been to lie on behalf of the prosecution in hopes of achieving a reduction of sentence. Cf. *Napue* v. *Illinois*, 360 U.S. 264, 266 (1959). Yet, both Nash and Goethe testified that Reck had been beaten, that his cries for mercy had been followed by sounds of blows and moans, and that soon afterward he fainted. (See text at notes 323-25, *supra*.)

The admitted facts and the circumstantial evidence supporting Reck's compelling story of brutality are so strong that the State has never been able to produce a plausible contrary explanation of why Reck suffered such severe physical reactions to police hospitality.[327] Given the State's total failure to explain the evidence, there is no reasonable basis for any conclusion except that Reck was the victim of violent beatings administered by the police for the purpose of coercing his confessions. Therefore, the State's use of Reck's confessions at his trial violated the due process clause of the Fourteenth Amendment. *Brown* v. *Mississippi*, 297 U.S. 278 (1936).

---

[327] One police officer, Sergeant Aitken, claimed he heard Dr. Abraham say that Reck had a "nerve reaction." (Ex. 2, p. 226/166). Dr. Abraham, however, took the witness stand twice at the trial and never testified that Reck had a "nerve reaction." (Ex. 1, pp. 948-55, Ex. 2, pp. 501-507). Of course, there is no explanation by the State as to how a "nerve reaction" could have caused the "foot square" puddle of Reck's "bright red" blood on the floor of the handball court in the police station. Nor does the State explain how Sergeant Aitken could solemnly deny, during the 1936 trial, that he had seen Reck vomit blood (Ex. 2, pp. 226/175-76) but vividly describe, during the 1952 post-conviction hearing, that he had seen Reck hemorrhaging (Ex. 1, pp. 405, 412-13) while claiming that he had given "exactly the same testimony" in 1936. (Ex. 1, p. 407).

III.

The Majority Opinion of the Court of Appeals Below Misapprehends the Undisputed Facts in the Record, and Misconceives the Meaning of This Court's Prior Decisions Dealing With Coerced Confessions.

The majority opinion of the Court of Appeals below does not even mention, much less distinguish, the decisions of this Court which are in point, which were relied upon by Petitioner below, and which were cited as controlling by Judge Duffy in his dissenting opinion. See Petition for Certiorari, Appendix A, p. 9; 274 F.2d at 255. Instead, the majority below relied upon *Stein* v. *New York*, 346 U.S. 156 (1953); *Lisenba* v. *California*, 314 U.S. 219 (1941); and *Gallegos* v. *Nebraska*, 342 U.S. 55 (1951).

Unfortunately, the majority below fails to mention the facts which on their face distinguish *Stein*, *Lisenba* and *Gallegos* from this case. Thus, it overlooks the fact that the defendants in *Stein* were hardened criminals: "These men were not young, soft, ignorant or timid. They were not inexperienced in the ways of crime or its detection, nor were they dumb as to their rights." 346 U.S. at 185-86. The majority opinion also fails to note that the *Stein* defendants were subjected to only "twelve hours of intermittent questioning" (346 U.S. at 185), not four to five days, as was Reck. And, in relying upon *Lisenba*, the majority neglects to mention that the defendant there was "a man of intelligence and business experience," whose pre-confession interrogation lasted only twelve hours and whose first confession came in a public restaurant while he and his interrogators were smoking after-dinner cigars. 314 U.S. at 229, 232, 242. Finally, the Court of Appeals ignored the fact that no one contended that the confessions of Gallegos

"were in fact coerced or involuntary" and that the testimony in that case as to the circumstances of the interrogation of Gallegos was conspicuously "uncertain [in] character." 342 U.S. at 68, 71. Once the facts of *Stein*, *Lisenba*, and *Gallegos* are noted, the inapplicability of these cases becomes apparent and need not be labored.

Not only did the Court of Appeals majority ignore the facts in *Stein*, *Lisenba* and *Gallegos* but it also ignores and distorts the facts in the case at bar. Thus, the majority opinion erroneously implies that Reck became ill but once (rather than four times) the third day and was carried but once (rather than twice) to the hospital. It ignores the fact that Reck vomited blood and repeatedly fainted. It ignores the fact that Reck was a stretcher case on the third night. It never once mentions that Reck was being held *incommunicado* and that Reck's father tried repeatedly to see him but was turned away by the police. Nor does it mention Reck's sparse sandwich diet of the first three days or his milk diet of the fourth and fifth days. It fails to mention the crucial fact—*established by a prosecution witness who was an employee of the prosecutor's own office*—that Reck was still sick when he confessed Saturday night. Isaacson, the State's Attorney's court reporter who took the confession, testified: "I could see he was sick . . . his face was ashen color, and he did not look well, just sick . . . very pale . . . white and sick looking . . . He walked weakly" (Ex. 1, pp. 590, 591, 593, 594). Most incredibly of all, the majority accepts the hearsay statement of a police officer who must have lied either at Reck's trial or the post-conviction hearing (see note 327, *supra*) when it states that a doctor diagnosed Reck's complete physical collapse and hospitalization as a mere "nerve reaction." Petition for Certiorari, Appendix A, p. 5; 274 F.2d at 252.

The Court of Appeals majority seemingly adopts, as one of the grounds for its holding, the Illinois Supreme Court's

characterization of the Reck confessions as "complete, detailed and consistent." Petition for Certiorari, Appendix A, p. 3; 274 F.2d at 251. This characterization, even if warranted, would be irrelevant. *Watts* v. *Indiana*, 338 U.S. 49, 51 n. 2. But it is worth noting that the characterization is not even warranted. Scrutiny discloses that Reck's confessions are not trustworthy because they are neither "complete" nor "detailed" in the usually accepted sense of those terms.

First: The District Court recognized that Reck volunteered substantially no information about the Peacock murder during the course of the "joint confession" which took place on Saturday (R. 29; Petition for Certiorari, Appendix C, p. 17; 172 F. Supp. at 738). This confession consisted for the most part of "Yes" and "Yes, sir" responses to the leading questions of Reck's interrogators. For long periods during the "joint confession," Reck remained silent. And, as the District Court noted in its opinion, Reck's individual statement of the following day was simply "more or less a reiteration of the joint confession" (R. 30; Petition for Certiorari, Appendix C, p. 17; 172 F. Supp. at 738), so Reck had nothing new to learn.

Second: Both confessions are significantly devoid of any reference to the murder weapon with which Reck was allegedly entrusted. A State prosecutor, in stark contrast to his otherwise uncanny memory, was unable to remember Reck's response to interrogation about this gun (Ex. 2, p. 226/8). If Reck's confessions were voluntary, there would have been no reluctance on his part to reveal—and the State to check—the location of this one item of demonstrative evidence which might have verified the confessions.

The skilled prosecutors who conducted the formal confession proceedings in Reck's case possibly realized the

dangers of incorporating in Reck's confessions any references to the whereabouts of the murder gun. Since Reck's responses about the gun's location might subsequently be demonstrated as patently false, their whole case would have been in jeopardy if the subject were pursued. Hence, Reck's confessions were framed to omit the disposition of the murder gun.

Third: Similarly, the automobile which, according to the confessions, transported the accused across Chicago to the murder scene had to be ignored in convicting them. The confessions made no reference to the manner in which the car was obtained. The police made no effort to find it. No one admitted owning it. No one confessed to stealing it. The car disappeared at the end of the story as conveniently as it had materialized at the beginning. Had the time and means of obtaining and disposing of this vehicle been articulated in the confessions, of course, defense counsel would have been able to check the truth of the statements against the official records of stolen and recovered cars, or the records of purchase and sale of any dealer who might have been involved. But again, the prosecution apparently deemed the risk too great to run. Again, the risk was avoided by "forgetting" to inquire about the demonstrative evidence which would establish the credibility of the confession one way or another (R. 22, Petition for Certiorari, Appendix C, p. 12; 172 F. Supp. at 735; Ex. 1, pp. 1/25-/27).

Fourth: The 13 deep lacerations in Dr. Peacock's head have never been accounted for. Nothing in the confessions explains these lacerations. The alleged one blow by a club could not explain such wounds. Again, the record is silent.

The Court of Appeals, by refusing to discuss *Fikes, Watts, Turner, Haley* and *Spano,* by purporting to rely upon three decisions of this Court which are clearly in-

apposite, by ignoring half the uncontroverted facts and distorting the remainder, and by making unwarranted assumptions of irrelevant factors, has departed from the decisions of this Court.

IV.

The District Court's Theory That the Coerced Confession Decisions of This Court Were Limited to "Prospective" Application Is Not Justified by the Rationale or History of the Constitutional Law of Coerced Confessions.

The District Court acknowledged that this Court had held that the determination of whether or not a confession is the product of psychological coercion depends upon the "totality of circumstances" surrounding its extraction (R. 40-41, Petition for Certiorari, Appendix C, p. 25; 172 F. Supp. at 741). The District Court conceded that under the cases, Reck's confessions were coerced, saying: "Today, the Due Process Clause is violated" (R. 52; Petition for Certiorari, Appendix C, p. 33; 172 F. Supp. at 745). Yet, the District Court refused the relief which such a finding of a due process violation requires. Its explanation for its refusal was that, since there had been a change in the law of due process, it was not bound by the "totality of circumstances" test but was permitted—indeed, required—to view the "practical aspects" and not give Reck a new trial since this opportunity might result in the release of Reck, who might become a danger to society (R. 43-45, 54, 55, 59, 60; Petition for Certiorari, Appendix C, pp. 26-27, 34, 37; 172 F. Supp. at 742, 745-46, 747).

The District Court's conclusion is incorrect because (1) the law of due process has always condemned coerced confessions, whether the product of physical or mental coercion; and (2) the "practical" reasons cited by the District

Court for denying Emil Reck his constitutional rights find no support in the record and are irrelevant to the only legitimate issue in this case, *viz.* whether his confessions were coerced.

(1) *Coerced Confessions—occurring before or after 1936 or involving physical or mental coercion—have always been condemned by the Constitution of the United States.*

The basic premise of the District Court's ruling is its statement that the law of coerced confessions has changed since 1936:

"Reck was convicted of this crime in 1936 and at *that* time the Due Process Clause was not violated by the circumstances surrounding the making of his confession. Today, the Due Process Clause is violated" (R. 52; Petition for Certiorari, Appendix C, pp. 32-33; 172 F. Supp. at 745).

• • • • •

"When Reck was convicted in 1936, neither the Supreme Court of the United States nor society felt that his rights under the Due Process Clause had been violated. Today, the same circumstances would result in a violation of that Clause" (R. 54; Petition for Certiorari, Appendix C, p. 34; 172 F. Supp. at 745).

• • • • •

"It is my opinion that social necessity requires re-evaluation of the Due Process Clause in Habeas Corpus cases wherein the petitioner has been imprisoned throughout an era in which the Clause has undergone a changing interpretation" (R. 53; Petition for Certiorari, p. 33; 172 F. Supp. at 745).

According to the District Court, a confession was not coerced in 1936 unless there was a "clear showing of physical coercion" (R. 43; Petition for Certiorari, p. 27; 172 F. Supp. at 742). This premise is false and with it the entire argument of the District Court falls.

Even the very judge who presided over Reck's original trial did not share the District Court's notions of the law. At the conclusion of his preliminary hearing in 1936 on the admissibility of the confessions, Judge Burke stated:

> ". . . if the person making the confession was abused in any way either by striking or threatening *or any form of mental or physical abuse,* then the confessions would not be free and voluntary confessions" (Ex. 1, pp. 979-80). (Emphasis supplied.)

Judge Burke's views were certainly not novel in 1936 in refusing to distinguish between mental and physical coercion. The Wickersham Commission had pointed out five years earlier in 1931 the speciousness of attempted distinctions between physical and mental coercion for purposes of determining admissibility:

> "In the light of the legal principles that forbid the use of compulsion to obtain confessions, rigid distinctions between particular types of compulsion are out of place. Any one of the following conditions may prevent a self-incriminating statement by a prisoner from being truly voluntary: physical types of the third degree; mental types, even though these shade into permissible questioning * * *." IV Reports, National Commission on Law Observance and Enforcement. P. 168 (U. S. Govt. Printing Office 1931).

Support for Commission's reasoning can be found in a 1920 decision of the Illinois Supreme Court, *People* v. *Vinci*, 295

Ill. 419, and in numerous other pre-1936 decisions in other jurisdictions, all condemning coerced confessions where there was not only no clear showing of physical brutality but where the only coercion was mental. The cases are collected in the annotation in 69 L. Ed. 1, 9 *et seq.*

Long before 1936, this Court had held that mental coercion rendered confessions involuntary and hence inadmissible in evidence. In an 1897 case, the Court held that the Fifth Amendment barred such confessions from federal criminal trials, saying:

> "[T]he principle . . . under the law of nature . . . was in its essence comprehensive enough to exclude all manifestations of compulsion, *whether arising from torture or from moral causes.* . . . As the facts by which compulsion might manifest itself, whether physical or moral, would be necessarily ever different, *the measure by which the involuntary nature of the confession was to be ascertained was stated in the rule, not by the changing causes, but by their resultant effect upon the mind,* that is, hope or fear, so that, however diverse might be the facts, the test of whether the confession was voluntary would be uniform, that is, would be ascertained by the condition of mind which the causes ordinarily operated to create." *Bram* v. *United States,* 168 U.S. 532, 547-48. (Emphasis supplied.)

The significance of this language is heightened by the circumstance that *Bram* was *not* a physical brutality case.

The lesson of *Bram* was reaffirmed in 1924 in *Ziang Sung Wan* v. *United States,* 266 U.S. 1, another Fifth Amendment decision excluding a confession as coerced although no physical brutality was employed by the officers who secured it. *Ziang Sung Wan* held that confessions obtained from a physically ill prisoner in the course of an incommunicado

detention of more than one week were coerced. Citing the *Bram* case, Justice Brandeis stated for the Court:

> "[A] confession obtained by compulsion must be excluded, whatever may have been the character of the compulsion. . . ." (266 U.S. at 14-15.)

It was against this background of Fifth Amendment case law that this Court, three months before Reck's conviction, held that the Fourteenth Amendment forbade the use of coerced confessions in State criminal trials. *Brown* v. *Mississippi*, 297 U.S. 278. The Court stated that such use offended a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." 297 U.S. at 285-86. Although *Brown* dealt with confessions obtained by whipping, this Court made it clear just four years later that the principle in *Brown* was the same as that announced earlier in *Bram* and *Ziang Sung Wan*. In *Chambers* v. *Florida*, 309 U.S. 227, a psychological coercion case decided in 1940, the Court cited *Ziang Sung Wan* and stated that:

> "Just as our decision in *Brown* v. *Mississippi* was based upon the fact that the confessions were the result of compulsion, so in the present case, the admitted practices were such as to justify the statement that 'The undisputed facts showed that compulsion was applied.'" (309 U.S. at 239 and M. 13.)

Therefore, when the 1936 decision in *Brown* v. *Mississippi* is viewed in the context of the Fifth Amendment cases which preceded it and the Supreme Court's own explanation in *Chambers* of the meaning of the *Brown* case, it is clear that the true test of a confession's voluntariness has never been whether there was a "clear showing of physical coercion" but whether "the undisputed facts showed that

compulsion was applied." It is equally clear that as far back as *Bram* in 1897 the Supreme Court applied a "totality of circumstances" test to determine coercion in a non-brutality case:

> "Although these facts may not, when isolated each from the other, be sufficient to warrant the inference that an influence compelling a statement had been exerted, yet when taken as a whole, in conjunction with the nature of the communication made, they give room to the strongest inference that the statements of Bram were not made by one who in law could be considered a free agent." (168 U.S. at 563-64.)

To be sure, the conclusion that a confession is the result of compulsion is established as a matter of law if the prisoner is struck by one blow. *Fikes* v. *Alabama*, 352 U.S. at 198. But this conclusion is certainly no less significant or compelling if it is reached by weighing the effect of sophisticated or crude psychological pressures upon the accused's weakening ability to resist. *Spano* v. *New York*, 360 U.S. at 321. Once coercion is established, the law does not distinguish between coerced confessions. No court has yet attempted to say that a confession produced by one blow is more "coerced" than one produced by days and nights of continuous secret interrogation, inadequate diet, and violent illness. The District Court should not have been the first to try.

The District Court's theories are not based upon any authority. That Court could not cite one case holding that convictions based upon confessions coerced in 1936 did not violate the Due Process Clause because not one decision of this Court has ever acknowledged that the year of the trial determines the constitutionality of the coercion. Nor could the District Court cite one case holding that coercion

in 1936 could be established *only* by a "clear showing of physical coercion" because not one decision of this Court has ever exempted mental coercion from the ban upon all coercion.

In short, the District Court never grasped the essence of this Court's decisions establishing that it is the ultimate fact of coercion—and not the particular means employed—that is crucial. These decisions condemn the use of confessions coerced by *any means* because coerced confessions are offensive to fundamental principles of justice and to the concepts of ordered liberty. As such, the Fourteenth Amendment condemned their use on the day of its adoption in 1868; it condemned their use in 1936 when Reck was convicted; and it condemns their use today when Reck's constitutional rights are at issue.

(2) *The District Court relied upon factual assumptions which find no support in the record and which are irrelevant to the issues in this case.*

The District Court assumed that Reck committed the Peacock murder and that he was too dangerous to be free (R. 52, 54, 55; Petition for Certiorari, Appendix C, pp. 33, 34; 172 F. Supp. at 745, 746). The District Court believed that these were practical elements which a judge could not ignore in passing upon the issue of whether Reck's constitutional rights were violated (R. 51; Petition for Certiorari, Appendix C, p. 32; 172 F. Supp. at 745). The District Court, however, not only committed legal error in considering these irrelevant "factors" (as the Court of Appeals did in considering the "credibility" of the confessions) but it fell into errors of fact in assuming that the record supported any findings of guilt or maladjustment (as the Court of Appeals did in assuming that the confessions were, in fact, credible).

The factors of guilt and adjustment to society are irrelevant to the constitutional issues involved. The Due Process Clause protects the guilty as well as the innocent. The question is whether the confession is coerced and not whether there is other evidence in the record to support the verdict. *Payne* v. *Arkansas,* 356 U.S. 560, 568. Similarly, the Due Process Clause protects the mentally retarded as well as the brilliant. See *Fikes* v. *Alabama,* 352 U.S. at 193. Any notion that only the well-adjusted have constitutional rights does not deserve serious consideration.

But even if guilt and adjustment were relevant, the record does not support the District Court's findings. The sole basis assigned by the District Court for believing in Reck's guilt was its statement that "Other than his own confession, the confessions of Goeth[e], Nash and Livingston tend to prove the crime against Reck" (R. 43; Petition for Certiorari, Appendix C, p. 26; 172 F. Supp. at 742). But the other confessions were not admissible evidence against Reck. The only theory upon which the confessions of the other boys could be used against Reck is that these confessions were made in his presence and that his failure to deny them constituted an adoption of their contents, *i.e.,* an admission by silence. But if Reck's own confessions were coerced, then it necessarily follows that his contemporaneous silence in the face of the confessions of the other boys was also coerced:

> "Clearly the same considerations that bar admission of the confession by Turner made over his own name extend to his contemporaneous adoption of the Johnson and Lofton confessions." *Turner* v. *Pennsylvania,* 338 U.S. 62, 65 (1949).

Therefore, by predicating Reck's guilt on the Nash, Goethe and Livingston confessions, and weighing this "factor" in

deciding whether Reck's constitutional rights had been violated, the District Judge assumed the point to be decided because the other confessions were not admissible against Reck if Reck's own contemporaneous confessions were coerced.

In addition, the District Judge failed to consider the fact that Livingston repudiated his confession, claimed that it was a lie and had been coerced, and protested his innocence. The District Judge also ignored the significant fact that, although Nash and Goethe were in the custody of the State and were present at the trial, they were never called to testify against Reck.[328] Thus, they were never subjected to cross-examination as to the truth or falsity of their extra-judicial assertions as to Reck's involvement in the crime. Nash and Goethe, at the time of Reck's trial, had already been sentenced on their pleas of guilty to the Peacock murder. Hence, they would have had no motive to lie on Reck's behalf in order to save themselves; indeed, their motivation may have been to lie on the State's behalf. Cf. *Napue* v. *Illinois*, 360 U.S. 264, 266. If the State thought that the Nash-Goethe story of the murder could withstand cross-examination, why did it not call to the stand these two "eye-witnesses" to the crime?

More puzzling than the District Court's belief that Reck was guilty was its opinion that Reck, due to his present mental condition, was a potential menace to society (R. 55; Petition for Certiorari, Appendix C, p. 34; 172 F. Supp. at

---

[328] Nash and Goethe testified only at the preliminary hearing on the admissibility of the confessions. (See text at notes 323-26 *supra*). By way of contrast, the State was not similarly averse in an attempt to impeach Reck's credibility, to produce four witnesses during the final day and one-half of the trial to testify that Reck had a gun on other, unrelated occasions. Ex. 2, pp. 772, 818, 838, 988, 1049. Reck categorically denied this surprise testimony. Ex. 2, pp. 1032-40.

746). The District Court's contention that Reck's "mental condition could not have improved over 22 years in prison," (*ibid.*), finds no support in the record. The State never made such a claim. Reck's counsel, presuming such evidence would be totally irrelevant except in a commitment hearing or a parole board proceeding, made no attempt to prove that Reck was well-adjusted to society after so many years of punishment and rehabilitation. Of all the errors below, the District Court's denial of Reck's constitutional rights because he might be maladjusted was the most drastic.

Irrespective of guilt, adjustment or other "practical" matters, Emil Reck is entitled to a new trial as a matter of principle. The District Court had no basis in the record for concluding that Reck was guilty or that he was a danger to society. Even if the State could make a strong "practical" case for denying Reck a new trial, constitutional principles make it mandatory to set aside his conviction and order his release unless he is convicted in a new trial untainted by coerced confessions. Emil Reck's constitutional rights are not to be subordinated on the ground that society "does not favor his release" any more than the "conscience of society" can be divined as favoring his imprisonment without a fair trial (R. 55; Petition for Certiorari, Appendix C, pp. 34, 35; 172 F. Supp. at 746). The inherent injustice of such an approach was rejected in *Chambers* v. *Florida*, 309 U.S. 227, 240-41:

> "We are not impressed by the argument that law enforcement methods such as those under review are necessary to uphold our laws. The Constitution proscribes such lawless means irrespective of the end. And this argument flouts the basic principle that all people must stand on an equality before the bar of justice in every American court. Today, as in ages past, we are not without tragic proof that the exalted

> power of some governments to punish manufactured crime dictatorially is the handmaid of tyranny. Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victim of prejudice and public excitement. Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death."

It is submitted that due process of law similarly commands that no such practice as that disclosed by this Record shall consign Emil Reck to prison for 199 years.

Conclusion

The decision of the Court of Appeals below should be reversed and the cause remanded with directions that Respondent release Petitioner from custody within a reasonable time unless, within such time, the State grants Petitioner a new trial.

Respectfully submitted,

ANTHONY BRADLEY EBEN

DONALD PAGE MOORE
RICHARD A. SIEGAL
Attorneys for Petitioner